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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

XLVIII VICTORIÆ.

ALDERTON *v.* ARCHER.

1884 Oct. 25.

Mayor's Court, London—Jurisdiction—Prohibition—Mayor's Court Procedure Act (20 & 21 *Vict. c. clvii.*), s. 12—*Cause of Action arising wholly or in part within the City of London or Liberties thereof.*

The terms of a sale of the lease, goodwill and fixtures of a business carried on in Surrey having been agreed upon orally, two counterpart documents were drawn up, embodying such terms. One of these was signed by the purchaser at Bow in the county of Middlesex. The other was subsequently signed by the vendor in the city of London. The two documents were then exchanged between the parties, and the deposit was paid at the office of the purchaser's solicitor in the city of London. The sum of 50*l.*, part of the purchase-money, being unpaid, the vendor sued for the same in the Mayor's Court:—

Held, that the cause of action did not in part arise within the jurisdiction of the Mayor's Court, and that therefore a writ of prohibition must issue.

Appeal against the order of a judge at chambers directing the issue of a writ of prohibition.

The facts were as follows: the plaintiff had commenced an action in the Mayor's Court to recover a sum of 50*l.*, balance of purchase-money for the lease, goodwill, and fixtures of a draper's business, sold by the plaintiff to the defendant. The defendant had never at any time dwelt or carried on business within the city of London or liberties thereof. The premises on which the draper's business was carried on were at New Cross in Surrey. The terms upon which the sale was to take place having been agreed upon orally by the parties, two counterpart documents were drawn up, embodying those terms.

The document was in the following terms:—

> "An agreement made this 17th day of August, 1883, between Anne Cooper Alderton of 31, Hollydale Road, Peckham, in the county of Surrey, hereinafter called the vendor, of the one part, and Ellen Archer of 21, Coborn Street, Bow, Middlesex, hereinafter called the purchaser, of the other part, whereby it is agreed as follows:—
>
> 1. The vendor will sell and the purchaser will purchase the messuage, shop and premises situate, &c., held under a lease dated 5th March, 1866, for the term of twenty-one years from 25th December, 1864, at the yearly rent of 25*l.* 10*s.* subject to the covenants and conditions on the lessee's part contained in the said lease, and also the right to a renewal of the said lease granted by and on the terms mentioned in a memorandum dated 27th May, 1882, and signed, &c.: and also the fixtures and fittings in and about the said premises, together with the goodwill of the business of a draper carried on at the said premises by George Horne. 2. The purchase-money for the said premises is the sum of 126*l.*, whereof 10*l.* is paid on the signing hereof to the vendor's solicitors as a deposit, and the balance of 116*l.* is to be paid on the 15th day of September next, when the purchase is to be completed. If the purchase shall not then be completed the purchaser is to pay interest at 5*l.* per cent. per annum on the unpaid balance of the purchase-money. 3. The vendor will within four days from the date hereof deliver to the purchaser an abstract of her title to the said premises, which shall commence with the said lease dated 5th March, 1866, and the purchaser shall not require the earlier title. 4. Possession of the said premises will be given to the purchaser on payment of the balance of the purchase-money, when the vendor and all other necessary parties will execute a proper assurance of the said premises to the purchaser. The vendor will pay all outgoings up to the completion of the purchase, and after that date the same shall be paid by the purchaser, and such outgoings shall if necessary for that purpose be apportioned. 5. If the purchaser shall insist on any objection or requisition which the vendor shall be unable or unwilling to comply with, the vendor may by notice in writing to be given to the purchaser rescind and determine this contract, whereupon it shall become absolutely void, and the vendor will thereupon return to the purchaser the said deposit, but without any interest, costs, or other compensation whatever. As witness, &c."

One of these counterpart documents was signed by the defendant at Bow, in the county of Middlesex. The other was subsequently signed by the plaintiff at her solicitor's office, in the city of London, and the two documents were exchanged between the parties, and the deposit of 10*l.* was paid, at the office of the defendant's solicitor, within the City.

The plaintiff had executed a conveyance of the lease and goodwill to the defendant, who had entered into possession of the premises.

A balance of 50*l.* out of the purchase-money remained unpaid, for which the action was brought. The defendant had obtained an order for a writ of prohibition at chambers, against which order the plaintiff appealed.

G. M. Cohen, for the plaintiff. The 12th section of the Mayor's Court Procedure Act, 20 & 21 Vict. c. clvii., gives the Mayor's Court jurisdiction in all cases where the debt or damages do not exceed 50*l.* if any part of the cause of action arises within the City. It is contended that here part of the cause of action did so arise. The action is to recover money due under the agreement for the sale of the drapery business. That agreement was not complete until the signature by the plaintiff of the counterpart agreement within the jurisdiction of the Mayor's Court. It is submitted that the fair inference from what took place is that the defendant's signature of the one counterpart was conditional only, and was not intended to be binding unless and until the plaintiff signed the other counterpart, as in the case of a deed executed as an escrow. The terms of the agreement shew that the contract was not to be complete until the payment of the deposit, which took place in the City.

[He cited *Allhusen* v. *Malgarejo*. (1)]

C. E. Jones, for the defendant. There was a complete oral agreement as to the terms of the purchase of which the memorandum was merely intended to be evidence. The contract being within the provisions of the Statute of Frauds no action could be brought except on a memorandum signed by the party to be charged, but as soon as such a memorandum is proved the cause of action is complete, and the plaintiff would have no need to prove that she signed the counterpart.

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(1) Law Rep. 3 Q. B. 340.

G. M. Cohen, in reply. Though there may have been terms orally agreed on, if the parties agree that they shall be reduced to writing, the writing constitutes the contract. It is clear from the terms and formal character of the document in this case that it was intended to constitute the contract.

GROVE, J. This is an application to set aside an order for a writ of prohibition. The point involved is one of some nicety. An agreement was made for the sale of certain property between the plaintiff and the defendant, and it is for non-payment of the unpaid balance of the purchase-money due under this agreement that this action was brought. The terms of this agreement were put in writing in duplicate, and the defendant signed one of the duplicates in Middlesex, but the other was subsequently signed by the plaintiff within the jurisdiction of the Mayor's Court. The argument of the plaintiff's counsel is that, both duplicates constituting the agreement, part of the cause of action arose within the jurisdiction of the Mayor's Court. The defendant's counsel says in answer that there was an oral agreement between the parties, and that, upon the terms of that agreement being put into writing and signed by the defendant, the party to be charged, there was a binding contract as against the defendant. It is suggested for the plaintiff that it was part of the understanding between the parties that duplicate agreements should be executed and that there was no complete agreement till both were so executed. Whether this was so or not is rather a question of fact or inference from facts than of law. I think that, under the circumstances, the onus of shewing affirmatively that there is not a complete cause of action upon the defendant's signature of one duplicate being proved lies on the plaintiff. Primâ facie, as it seems to me, immediately upon the signing of the writing containing the terms of the agreement by the party to be charged, there was a binding agreement by her. I think it must be proved affirmatively for the plaintiff, that it was not intended that one duplicate should be binding till the other was signed by the plaintiff. It appears to me that, so far from that being shewn affirmatively by the plaintiff, as the facts stand, they tend in the contrary direction, and rather shew that there was a complete contract before the plaintiff signed the other duplicate. I am therefore of opinion that the order for the prohibition was rightly made.

SMITH, J. I am of the same opinion. The question is whether the cause of action wholly or in part arose in the city of London. What is the cause of action? It arises, as it seems to me, upon the written agreement signed by the defendant in Middlesex. The plaintiff is suing upon an agreement which is within the Statute of Frauds, and therefore she could only recover on production of a writing signed by the party to be charged. I think that, when the defendant signed in Middlesex, the plaintiff having then got the signature of the party to be charged, her cause of action was complete so far as the contract is concerned. It is true that the plaintiff signed a counterpart in the city of London, and her counsel contends that the plaintiff would have to prove that she signed such counterpart, and that till she did so sign the writing signed by the defendant only operated as an escrow. I must say that on the facts before me I cannot find any proof of this. It seems to me that the writings were only intended to constitute memorandums of the oral agreement previously arrived at in order to satisfy the Statute of Frauds, and that as soon as the defendant signed there was a complete agreement as against her. For these reasons, I think the application to set aside the order for a prohibition must be refused.

Appeal dismissed.

Solicitors for plaintiff: *Steavenson & Couldwell.*

Solicitors for defendant: *Phelps, Sidgwick, & Biddle.*

E. L.

1884
Nov. 21.

[IN THE COURT OF APPEAL.]

EMENY *v.* SANDES.

Practice—Costs—Action remitted for Trial to County Court—Order LXV., rr. 1, 4.

By Order LXV., rule 1 (Rules of the Supreme Court, 1883) the costs of and incident to proceedings in the Supreme Court are to be in the discretion of the Court or Judge, subject to a proviso where an action is tried with a jury. By rule 4 of the same Order, where an action is ordered to be tried in a county court under 19 & 20 Vict. c. 108, s. 26, the costs of the action are subject to these rules to follow the event, unless, by the registrar's certificate of the result of the trial, it appears that the county court judge was of opinion that the question ought to be referred to a judge of the High Court, in which case no costs are to be recovered unless ordered by the Court or a judge.

Where an action has been ordered to be tried in a county court under 19 & 20 Vict. c. 108, s. 26, and has been so tried there, the High Court retains its power under Order LXV., rule 1, of dealing with the costs of the action, notwithstanding rule 4 of that order, and the absence in the registrar's certificate of any expression of opinion by the county court judge as provided for by that rule.

Application for an order that the plaintiff should pay the defendant's costs of the action, or that each party should pay his own costs.

The facts were as follows. The action was brought to recover the sum of 52*l.* 8*s.* 6*d.*, being a balance alleged to be due to the plaintiff for work done and materials provided by the plaintiff as a builder. The defendant paid into Court the sum of 37*l.* 2*s.* 6*d.*

The action was remitted to the county court for trial under the provisions of s. 26 of the County Courts Act, 1856.

At the trial, the county court judge decided to disallow certain items claimed by the plaintiff for his own time and to allow the carting of bricks at 4*s.* 6*d.* per 1000 instead of 10*s.* per 1000 as charged for in the particulars. The judge did not himself give judgment for any sum, but directed the registrar to go through the plaintiff's particulars and make the necessary calculations, and that his judgment should be for the amount which the registrar thus ascertained.

Owing to the figures not having been previously worked out at the amounts directed by the judge, and owing to the judge's rising immediately after he had given his decision in the action, the defendant's solicitor was unable to make any application with regard to the costs of the action.

The registrar by his certificate, dated the 27th of September, 1884, disallowed 11*l.* 3*s.* 6*d.* on account of plaintiff's work, and 4*l.* 0*s.* 3*d.* on account of the charge for cartage, leaving the plaintiff, therefore, entitled to 2*s.* 3*d.* beyond the amount which the defendant had paid into Court.

The defendant, except as to this amount, succeeded on all the items in dispute.

Morton Smith, for the defendant, moved for an order as above mentioned, on the ground that the plaintiff had only recovered a nominal amount in the action. It is clear that, previously to the Rules of the Supreme Court, 1883, in the case of actions remitted for trial in the county court, the costs were in the discretion of the High Court. The Court would in the case of the recovery of a nominal sum make an order depriving the successful party of costs, or ordering him to pay costs: *Harris* v. *Petherick* (1); *Myers* v. *Defries.* (2) It is submitted that there is nothing in the Rules of 1883 to take away this jurisdiction from the High Court. Order LXV., rule 1, is substantially, similar to the old Order LV. Order LXV., rule 4, was only intended to remove the difficulty which occurred under the old practice, viz., that, the county court judge having no jurisdiction over the costs in actions remitted for trial, and tried without a jury in the county court, applications with regard to such costs had in all such cases to be made in the High Court. It was never intended that the High Court should be deprived of all jurisdiction over the costs except where the registrar certifies under rule 4. The provisions of that rule are expressed to be subject to those of the principal Act and Rules; and rule 1 gives the High Court a general jurisdiction over costs.

Poyser, for the plaintiff, shewed cause. The provisions of Order LXV., rule 4, are express that, in the case of actions remitted for trial to the county court, the costs of the action shall follow the event, unless by the registrar's certificate of the

(1) 4 Q. B. D. 611.

(2) 4 Ex. D. 176.

result of the trial it appears that the judge before whom the action was tried was of opinion that the question of costs ought to be referred to a judge of the High Court. The expression "subject to the provisions of the principal Act and Rules," means subject to such part of the rules as is not inconsistent with rule 4 itself. The provisions of rule 1 are also expressed to be "subject to the provisions of the Act and these rules." [He was then stopped by the Court.]

STEPHEN, J. I think this application must be refused. I was at first somewhat struck by the argument for the defendant, but on consideration I do not think that the true construction of Order LXV., r. 4, can be such as was suggested on his behalf. The result of that construction would be that in every case where an action was remitted to the county court and the county court judge decided not to refer the question of costs to a judge of the High Court, there would be an appeal to the High Court against his decision with regard to the costs. It appears to me that such a result would be altogether inconsistent with the provisions of rule 4, and manifestly in contravention of the object which that rule was designed to effect. I think that rule 4 must be read as subject to such provisions of the other rules as are not inconsistent with its provisions, and as in effect creating another exception from the provisions of rule 1, similar to those created by the provisoes to rule 1 itself. Whether any application can now be made to the county court judge with respect to the costs or whether he is functus officio in the matter, is a question which it is unnecessary for us on the present occasion to determine.

MATHEW, J. I am of the same opinion. The argument of the defendant's counsel was that the general jurisdiction over the costs given to the Court by rule 1 was not interfered with in such a case as this by rule 4; and that, although there was no certificate with regard to the costs under rule 4, the defendant was entitled to come to this Court and ask for a direction that the costs should not follow the event, but that the defendant should have his costs. I cannot suppose for a moment that this was the intention with which rule 4 was framed. Such a construction would let in again to a great extent the inconveniences which arose from the decision in *Farmer* v. *May* (1), and which the rule was obviously intended to prevent.

Application refused.

E. L.

The defendant appealed.

Morton Smith, for the defendant. The question turns on Order LXV., rule 4. (2) Before that rule the practice was if the action was tried in the county court with a jury for the costs to follow the event, but if it was tried without a jury it was necessary to make an application for costs, and that application must have been made to the High Court; for, as decided in *Farmer* v. *May* (1), the power over costs of an action as given to the High Court by the old Order LV., which corresponds with the new Order LXV., rule 1, remained in such High Court notwithstanding the action was remitted to the county court for trial under 19 & 20 Vict. c. 108, s. 26. In the present case the Divisional Court held that they had no jurisdiction, because it did not appear from the certificate that the county court judge was of opinion that the question of costs should be referred to the High Court, and because in their opinion rule 4 of Order LXV. did not include the whole of rule 1 of that order, In that respect the Divisional Court were wrong, and rule 4 should be read as introducing the whole of such rule 1, and so saving the discretionary power over costs given to the Court or judge by that rule.

Malden, for the plaintiff. The county court judge not having certified that in his opinion the question of costs should be referred to the High Court, left the costs to follow the event.

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(1) 50 L. J. (C. P. D.) 295.

(2) By Order LXV., rule 4, "Where an action is ordered to be tried in a county court under the provisions of 19 & 20 Vict. c. 108, s. 26, the costs of the action shall, subject to the provisions of the principal Act and these rules, follow the event, unless by the registrar's certificate of the result of the trial, it shall appear that the judge before whom the action was tried was of opinion that the question of costs ought to be referred to a judge of the High Court, in which case no costs shall be recovered unless ordered by the Court or a judge."

Order LXV., rule 4, leaves it absolutely to the county court judge alone to determine whether the costs shall follow the event or not, and unless he so choose by certifying that the question of costs ought to be referred, the High Court has no jurisdiction over the costs.

BRETT, M.R. There are two points in this case, one as regards the alleged practice in the county court, and the other relates to the right construction of Order LXV., rule 4. As regards the practice of the county court, what occurred was this: the county court judge thought that he was not in a position to give judgment in this action until an inquiry, involving an arithmetical calculation, had been made by the registrar, but when that was made the judgment must be that of the judge and not of the registrar. After the inquiry and calculation had been worked according to the principles laid down by the county court judge, it appeared that the defendant had not paid enough into court by the sum of 2*s.* 3*d.* It has been argued that by so referring such inquiry to the registrar the county court judge had lost the power of dealing with the costs of the action, but I cannot agree to that; the registrar before he certified the result should, I think, have communicated with the county court judge, and should have left him to exercise if he pleased his discretion as to the costs. He might then have left them to follow the event, or he might have caused the certificate to certify that in his opinion the question of costs should be referred to a judge of the High Court, and if he had so referred it, the matter would have gone before a judge at chambers who, though not bound by such certificate, would have considered it, and would have determined how the costs should be dealt with. It seems to me, therefore, that the defendant should have asked the registrar to consult the county court judge before he certified the result to the High Court. He did not, however, do so, and the certificate went without any opinion of the county court judge appearing in it that the question of costs should be referred to the High Court. It was, therefore, suggested that the High Court had no power to make any order as to the costs, and the Divisional Court were of that opinion, and so held on their construction of Order LXV., rule 4, because such rule 4 begins by saying that where an action is tried in the county court under 19 & 20 Vict. c. 108, s. 26, the costs shall, subject to these rules, follow the event unless there appear in the certificate what did not appear in this case. But part of rule 1 of the same Order leaves the costs of all proceedings in the Supreme Court in the discretion of the Court or judge, and if the whole of that rule is incorporated in rule 4 the High Court had power to deal with the costs in this action. The first question we have to consider is, how we ought to interpret rule 4 of Order LXV., and next what is the consequence of such interpretation. Now, can it be said that "subject to" "these rules," in such rule 4 means only subject to *part* of these rules. It cannot, I think, be so restricted; it must refer to *all* the rules, and so the whole and not part only of rule 1 is incorporated in rule 4. Then what is the consequence? Had the action been tried in the High Court the judge at the trial might or might not have dealt with the costs, but if he had not done so, then under rule 1 the Court would have had power to have done so on an original motion to the Court by one of the parties. Then if the whole of such rule 1 is incorporated in rule 4 although the county court judge may not have caused his opinion to appear on his certificate that the question of costs ought to be referred, still either of the parties may make an original motion to the High Court and such Court will have jurisdiction to deal with the costs. It is said that if that be held, then rule 4 will have no effect at all, but that is not so, because that rule saves the necessity of always going to the High Court by making the costs follow the event, except where in the opinion of the county court judge there are peculiar circumstances in any particular case which make it desirable that the question of costs should be referred to a judge of the High Court.

I am therefore of opinion that the Divisional Court had jurisdiction in this case over the costs, and we have now to do that which might have been done by the Divisional Court. The defendant I think acted incautiously in not getting the registrar to consult the judge before he certified the result, and therefore although the defendant was right in making the application he made to the Divisional Court, yet as he might have obviated some expense if he had done what he should, he ought not to have the costs of such application. He was right however in appealing to this Court and is entitled therefore to the costs of the appeal. With regard to the costs of the action the plaintiff is entitled to the costs up to the time the money was paid into court. As to the costs of the trial neither party we think should have those costs.

COTTON, L.J.: I agree that the proper order is that which the Master of the Rolls has stated. Order LXV., rule 4, is subject to "these rules" and one cannot select any one of such rules or any part of any rule to which such rule 4 is to be subject. The first part of rule 1 of that Order must be regarded just as much as what follows it, and therefore in my opinion the Divisional Court had jurisdiction over the costs in this action.

LINDLEY, L.J.: I am of the same opinion. In order to understand Order LXV., rule 4, it is necessary to bear in mind what was the old practice. The power over the costs of an action sent, under 19 & 20 Vict. c. 108, s. 26, to be tried in the county court has always been held not to be in the county court judge but in the High Court, and notwithstanding that s. 26 says that the judgment is to be signed in accordance with the certificate of the registrar of the county court, the practice has been that the successful party could not get his costs without the order of a judge of the High Court. It has been considered to be more convenient to dispense with the necessity of getting such order in every case, and to enable the successful party to have his costs unless the county court judge who has tried the case thinks he ought not to have them, and therefore these words are introduced into rule 4 of Order LXV. inviting the county court judge to certify his view to the High Court if he thinks it is a case in which the costs ought not to follow the event. Because in this case owing to an unfortunate occurrence the county court judge has not so certified the Divisional Court is not deprived of its power over the costs. I cannot agree with the court below that only a particular part of rule 1 of the same order is incorporated in rule 4. The whole of this rule is incorporated in rule 4 and the Divisional Court had jurisdiction in the matter.

Appeal allowed.

Solicitors for plaintiff: *Clarke & Catkin.*
Solicitor for defendant: *W. M. Taylor for R. R. Hill, Ipswich.*

W. P.

[IN THE COURT OF APPEAL.]

Nov. 19.

THE QUEEN ON THE PROSECUTION OF HOOLEY v. THE LICENSING JUSTICES OF PIREHILL NORTH, STAFFORDSHIRE.

Mandamus—Practice—Pleading to return to Writ of Mandamus—Return of unconditional Compliance—Rules of Supreme Court, 1883, *Order LIII., r.* 9; *Order LXVIII., r.* 1; *Order LXXII., r.* 2—9 *Anne, c.* 20 [*Revised Ed. Statutes,* 9 *Anne, c.* 25]—1 *Wm.* 4, *c.* 21—46 *&* 47 *Vict. c.* 49.

A return of unconditional compliance to a writ of mandamus, which is not a peremptory writ, may be pleaded to, notwithstanding Order LIII., rule 9, since the procedure of pleading to the return to such writ as regulated by the repealed statutes 9 Anne, c. 20 [Revised Ed. Statutes, 9 Anne, c. 25], and 1 Wm. 4, c. 21, is preserved by Order LXVIII., rule 1, and Order LXXII., rule 2.

In August, 1883, an application by the prosecutor was made to the defendants justices at the general annual licensing meeting for the division of Pirehill North, to renew a license or certificate for the sale of beer at a beerhouse called the "Horse and Jockey," at Tunstall, within such division of the county. The justices refused the application upon a different ground from any of those on which they were entitled to refuse such renewal in accordance with the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27). Thereupon, at the instance of the prosecutor, a writ of mandamus was issued directed to the defendants, and commanding them to hold within a reasonable time a further adjournment of the adjourned general annual licensing meeting for the said division, and at such further adjournment to proceed to hear and determine pursuant to the statutes in that behalf the matter of the said application for the renewal of such license or certificate.

The defendants made a return to that writ, in which they certified and returned that within a reasonable time after the service of such writ they held on the 21st of April, 1884, a further adjournment of the adjourned general annual licensing meeting for the said division, and that they did on that day in due form of law proceed to hear and determine pursuant to the statutes in that behalf the matter of the application by Hooley for the renewal of such license, and that they did on that day hear and determine the matter of the application.

To this return the prosecutor pleaded a plea, in which he traversed the defendants having heard and determined the application, and stated that the defendants, contrary to law and to the statutes, wholly neglected and refused to renew the license or certificate. The plea further set out the facts connected with the application, shewing that the house had been licensed as a beerhouse ever since May, 1869, and that the grounds on which the justices had refused the application, both before and after the issuing of the writ of mandamus, were different from those allowed by the Wine and Beerhouse Act, 1869, and concluding with the allegation that under the circumstances aforesaid the defendants did not in due form of law proceed to hear and determine pursuant to the statutes in that behalf the matter of the application, and did not hear and determine the same.

The defendants moved in the Queen's Bench Division that this plea should be struck out or set aside upon the grounds that it was a nullity, and that no pleading was allowed by law to such a return, and that it was irregular in that it complained of the non-performance of acts not by the writ commanded, and which could not lawfully be commanded by the writ, and that it was an argumentative traverse, and also irregular in form and embarrassing.

The Queen's Bench Division dismissed such motion. (1)

The defendants appealed.

Bosanquet, Q.C., and *H. D. Greene*, for the defendants. The return is one of unconditional compliance with the writ, and Order LIII., rule 9, of the Rules of the Supreme Court, 1883, which

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(1) 13 Q. B. D. 696.

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allows the applicant to plead to the return to a writ of mandamus expressly excepts the case of a return of unconditional compliance. (1) At common law there was no power of pleading to the return to a writ of mandamus, but by 9 Anne, c. 20, s. 2, which was extended by 1 Wm. 4, c. 21, to all other writs of mandamus, it was enacted that as often as in any of the cases mentioned in the 1st section (which related to the rights of offices in corporations) "any writ of mandamus shall issue," "and a return shall be made thereto it shall and may be lawful to and for the person or persons suing or prosecuting such writ of mandamus to plead to or traverse all or any of the material facts contained within the said return," &c. Both those statutes are repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49, s. 3), which does not, like the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 39), contain any saving clause by which the "course of pleading, practice or procedure" is saved, notwithstanding the same may have been derived from any enactment so repealed. The Queen's Bench Division held that there was a well-known practice of pleading to a return to a writ of mandamus, and that that had been saved by Orders LXVIII., rule 1, and LXXII., rule 2 (2), but that is an error, for it was not the practice ever to plead to a return of unconditional compliance.

Jelf, Q.C., and *J. Rose*, for the prosecution. It is true that in practice a return of unconditional compliance to the writ of mandamus has not been traversed, at least on inquiry of the Master and at the offices no instance of such having been done can be found; but it is not the less the practice because no instance of it can be found. The statutes of 9 Anne, c. 20, and 1 Wm. 4, c. 21, established the procedure and practice on returns to writs of mandamus, and made such returns traversable. Before 9 Anne, c. 20, if the Court saw that the only proper return which could be made to the writ must be that of performance, the Court granted a peremptory mandamus. In other cases the Court granted the writ in the alternative, which concluded as follows: "and how you shall have executed this our writ make known to us," &c. To that there might have been a return of excuse or performance, but the expression "return" was applicable to both. If there were no return, or one which was clearly bad on the face of it, an attachment went at once; but if the answer was good on the face of it, though wrong as to its facts, an action for a false return was the only course open to the party at whose instance the writ had been issued. It was under that state of the law that the statute of 9 Anne, c. 20, was passed; and afterwards the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 77, applied that Act and the Common Law Procedure Act, 1852, to the pleadings and proceedings upon the writ of mandamus. The case of *Reg.* v. *Mainwaring* (1) shews how the justices might in their return set out the grounds on which they had dismissed an information which they were ordered by the writ to hear and determine, so that the point whether they had obeyed the writ might be and was raised on demurrer to the return. That course might have been followed here if the justices had stated in their return the matter which appears in this plea. At all events, the return of obedience is nevertheless a return, and therefore by 9 Anne, c. 20, it could be pleaded to. Though that statute has been now repealed, it was existing when the Rules and Orders of the Supreme Court, 1883, were passed, and the procedure under it has been preserved. By s. 21 of the Judicature Act, 1875, all forms and methods of procedure in force at the commencement of that Act were to continue to be used and practised, and Orders LXVIII., rule 1, LXXII., rule 2, save the then existing procedure and practice with respect to returns to writs of mandamus.

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(1) Order LIII., rule 9: "When any return is made to a writ of mandamus other than an unconditional compliance therewith, the applicant may plead to the return within such time and in like manner as if the return were a statement of defence delivered in an action, and subject to these rules, this pleading, and all subsequent proceedings, including pleadings, trial, judgment, and execution shall proceed and may be had and taken as if in an action."

(2) By Order LXVIII., rule 1: "Subject to the provisions of this order, nothing in these rules, save as expressly provided, shall affect the procedure or practice in any of the following causes or matters," viz., inter alia, "Proceedings on the Crown side of the Queen's Bench Division."

By Order LXXII., rule 2: "Where no other provision is made by the Acts or these rules, the present procedure and practice remain in force."

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(1) 27 L. J. (M.C.) 278.

Bosanquet, Q.C., in reply. What is called here a return, is not in fact a return, but a certificate of obedience to the writ. Order LXVIII., rule 1, says that nothing in the rules except as expressly provided is to affect the procedure or practice in cases of proceedings on the Crown side, therefore Order LXXII., rule 2, does not apply to the procedure on mandamus.

Brett, M.R. In this case a writ, which was not a peremptory writ of mandamus, was directed to certain licensing justices in Staffordshire ordering them to hear and determine an application for the renewal of a beer licence. To this writ the justices made a return, the accuracy of which the person at whose instance the writ was issued claims a right to deny. The return of the justices was simply that they had obeyed the writ. The prosecutor tried by a plea to such return to shew that the justices were in error, and that they had not in fact obeyed the writ. It is said that he cannot so plead, but that he must accept the return as it is, and in order to get at the very same end as he sought to do by this plea he must begin a new proceeding, that is to say, he must bring an action for a false return. Supposing he were to bring such action, the falsity on which he would have to rely in order to maintain such action would be that the justices did not hear and determine his application as they said they had done, and to support that he would have to bring forward by pleading or evidence the same facts as are set out in this plea, and on them the opinion of the Court would have to be taken. So that the question comes to be this, are the parties entitled to raise the point in dispute between them at this stage of the proceedings, or are they to stop and begin a fresh one? What good will be done by beginning such fresh proceeding? It will only add to the costs, and in all other respects it signifies not which course is taken, for in either case the justices will have to undergo the ordeal of having the validity or not of what they did determined. Now, whenever a question of mere procedure arises, and the point is whether the Judicature Act has failed to simplify the procedure, our duty is, to my mind, to advance the remedy given by that Act, and to assume, if we can, that in every case in which it is possible to do so, the Judicature Act meant to simplify proceedings. Accordingly, unless obliged to decide otherwise, I think that the simple way of raising the question in dispute by pleading to the return should be allowed, and that the Court should not compel the prosecutor to stop the present proceedings and begin again.

Now it is to be observed that the writ in the present case was one directing the justices to hear and determine the application for a licence, and was not a peremptory writ. The justices must have known that the party who obtained the writ desired to have the opinion of the Court whether the justices had heard and determined the application for a licence according to law. Then, whenever the dispute has been as to whether there has been such a hearing and determination by the justices, the usual course has been for the justices in their return to the writ to state what they have in fact done, and so to leave it to the Court to say whether what they have done is or not a hearing and determination. That has been not only the usual, but I think it has been almost the invariable course, and when that has been followed it is not denied that the matter in dispute may be raised by traverse or demurrer, or what is now equivalent to a demurrer. In the present case, however, the justices, although they must have known what was the matter in dispute, have taken upon themselves the determination of both the law and facts, and have simply returned that they have obeyed the writ. If they can do this, the power is in their hands either to force on an action for a false return, or to raise the question in dispute on the proceedings.

Now, certainly, the return, though a return of unconditional compliance, is a return to the writ of mandamus, which in this case was not a peremptory writ. How then were the proceedings on a return to such writ regulated by 9 Anne, c. 20? It seems to me that the words of that statute are large enough to have allowed such a return to have been traversed; and, therefore, I take it that as long as that statute remained in force that was the mode of procedure, though it was not the practice to resort to it, because it was not necessary to do so as the justices used to set out the facts in their return.

Then how has the Judicature Act and the Orders and Rules under it dealt with this matter? I think that the person who drew up Order LIII., rule 9, thought that there could not be a plea to a return of unconditional compliance with the writ of mandamus. If so that rule 9 has not dealt with a return of unconditional compliance. It has excepted it out of that rule, and has not dealt with it. How is the procedure then to be regulated? It is a matter on the Crown side of the Queen's Bench Division, and by Order LXVIII., rule 1, "nothing in these rules save as expressly provided shall affect the procedure or practice in" any of the matters there specified, amongst which are "proceedings on the Crown side of the Queen's Bench Division." Therefore it seems to me, whether one looks at Order LXVIII., rule 1, or Order LXXII., rule 2, or both together, it is a matter not dealt with by the rules, and the old procedure is to continue in force, that is, the procedure regulated by statute 9 Anne, c. 20, and, as I have already stated, that statute enables a return such as that in the present case to be pleaded to. It is said, however, that that statute has been repealed. No doubt it has, but it was not repealed until after these new rules had been passed, and therefore when these rules provided for the application of the procedure regulated by 9 Anne, c. 20, to such a case as the present, the utility of that statute was at an end, and accordingly on that ground it was put into the general repealing Act, which was passed to get rid of statutes which were a mere incumbrance on the statute-book. For these reasons, I think I ought to adhere to the judgment of the Divisional Court. I will not say that this is not one of those kind of cases which might have been decided either way, but having been decided according to a view which I think is good, and considering, as I do, that it is the duty of the Court to advance the remedy under the Judicature Act, I am of opinion that the decision ought to be affirmed.

COTTON, L.J. I am of the same opinion. The question is one of procedure, namely, whether the return in this case to the writ of mandamus which is not peremptory can be tried by a proceeding in such return, or whether it must be by a separate action? I think that it may be properly tried without resorting to a separate action.

The return in this case is that the justices have obeyed the writ, that is to say, that they have heard and determined the matter, and the question is whether what they in fact did was really a hearing and determining of the matter. Now, when one looks at the orders and rules under the Judicature Act one finds that Order LIII., rule 9, deals to some extent with proceedings on the return to a writ of mandamus but not to those in such a case as the present where the return is that of unconditional compliance, for that rule says, "when any return is made to a writ of mandamus other than an unconditional compliance therewith the applicant may plead to the return." So that that rule does not apply to this case. Then it is said that there can be no pleading to this return, because the statutes of 9 Anne c. 20, and 1 Wm. c. 21, which enabled pleadings to be made to the return of a writ of mandamus, are repealed; and further, it is said, that those statutes did not give a right to plead to a return of unconditional compliance. I do not think that that last is a right construction of the Act 9 Anne c. 20, which is the statute on which this question really turns. The words of s. 2 of that statute are general, and do not, as I see, except any return from its provision. It says "it shall be lawful for the person or persons prosecuting such writ to plead to or traverse all or any of the material facts contained in the return," and there is nothing in that section to restrain the generality of that word "return." The return in the present case of unconditional compliance is still a return, and that it is so, is shewn, I think, by Order LIII., rule 9, which deals with returns to a writ of mandamus other than a return of unconditional compliance. Thus, there being nothing in the statute 9 Anne, c. 20, to restrict the word "return" so as to prevent its applying to a return of unconditional compliance, the question is, does the procedure under that statute still continue notwithstanding that the statute has been repealed? I think it does. Order LXXII., rule 2, is this: "Where no other provision is made by the Acts or these rules the present procedure and practice remain in force." Now, there was no practice in such a case as this, because it was not usual to make such a return as has been made here, but at the time the Judicature Orders and Rules were passed the statute

9 Anne, c. 20, was existing, which regulated the procedure with regard to writs of mandamus so as to enable the truth of the return to be tried without a separate action, and consequently when the rules were passed there was existing the procedure under that statute of Anne. Then it is said that Order LXVIII., rule 1, prevents Order LXXII., rule 2, from applying to procedure in writs of mandamus because it says nothing in the rules save as expressly provided shall affect the procedure or practice in, inter alia, "proceedings on the Crown side of the Queen's Bench Division," and as procedure in regard to writs of mandamus is not expressly provided for by Order LXXII., therefore that rule 2 of that Order does not apply so as to keep alive the procedure under the statute of Anne when that Act has been repealed. In my opinion that is not a sound construction of those orders. Order LXVIII., rule 1, provides only for the proceedings on the Crown side of the Queen's Bench Division not being altered by the rules, but I think it would be wrong not to construe Order LXXII., rule 2, as made with the knowledge that the statute of Anne was going to be repealed, and with the intention that it should keep alive such existing procedure under that Act as had not been incorporated with and expressly provided for by the Orders and Rules. This appeal must, therefore, in my opinion, be dismissed.

LINDLEY, L.J. I am of the same opinion. The difficulty has arisen in this case from the wording of Order LIII., rule 9. It is plain that those who framed that rule assumed that returns of unconditional compliance with the writ of mandamus could not be traversed. As a matter of fact such returns were not usually traversed. That it has not been the practice to traverse them has been now ascertained, I think, beyond all question, but it does not follow that they could not be traversed. That depends on the construction of 9 Anne, c. 20. Mr. Bosanquet endeavoured to give a narrow construction to the word "return" in s. 2 of that Act so as to exclude from its meaning what he called not strictly a return, but a certificate of compliance. I can see nothing in the Act or books of practice to justify any such distinction. We are not dealing here with a return of compliance with a peremptory mandamus, and I cannot find any authority for saying that a return of compliance is not a return within the meaning of the statute of Anne. Then as to the other questions which we have had to consider, I am of opinion that Order LXXII., rule 2, which preserves the then existing procedure and practice, is applicable to this case. The argument as to the repeal of the statutes of Anne and Wm. IV. is too refined. It invites us to defeat the object of the legislature in passing the repealing Act 46 & 47 Vict. c. 49, which was that that Act and the Orders and Rules should be worked together, and not that they should be worked, as we are asked to decide, so that they shall destroy each other.

Appeal dismissed.

Solicitors for prosecutor: *Robinson, Preston, & Stow, for Hollinshead & Moody, Tunstall.*

Solicitors for defendants: *Thomas White & Sons, for Hand, Blakiston, Everett, & Hand, Stafford.*

W. P.

Oct. 31.

[IN THE COURT OF APPEAL.]

EX PARTE WALLACE. IN RE WALLACE.

Bankruptcy—Bankruptcy Petition by Creditor—Signature—Signature by Attorney—Bankruptcy Rules, 1883, *r.* 125—*Appendix, Form No.* 10.

A bankruptcy petition by a creditor may be signed on his behalf by his duly constituted attorney.

A power of attorney authorized the attorney (inter alia) "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings touching anything in which I or my ships or other personal estate may be in anywise concerned":—

Held, that this power authorized the attorney to sign on behalf of his principal a bankruptcy petition against a debtor of the principal.

APPEAL against a receiving order.

On the 18th of August, 1884, a bankruptcy petition was presented by William Richards of Prince Edward's Island, in the Dominion of Canada, against J. J. Wallace, who carried on business in the city of London. The petition was signed "William Richards, by his attorney, Thomas Picton Richards." The signature was attested by a witness, and the attestation clause was as follows: 'Signed by the petitioner by his attorney, Thomas

Picton Richards, in my presence." The petition alleged that Wallace was indebted to the petitioner in the sum of 800*l.*, the amount due in respect of a dishonoured bill of exchange for 800*l.* drawn by Wallace, of which the petitioner was the holder. On the 8th of February, 1879, William Richards, who was a shipowner, executed a power of attorney in favour of Thomas Picton Richards. This power contained a recital that William Richards was possessed of certain ships and vessels, and shares in ships and vessels, and that he had occasion from time to time to send to England for sale and otherwise other ships and vessels, and to transact business of various descriptions there, and that he was also possessed of other personal property and effects in the United Kingdom and elsewhere on the continent of Europe, and that he was desirous of appointing an attorney to manage his affairs and business. And he thereby appointed T. P. Richards to be his attorney in his name and on his behalf (inter alia) "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings touching anything in which I or my ships or other personal estate may be in anywise concerned." On the 17th of October the petition was heard by Mr. Registrar Brougham. One of the objections taken on behalf of the debtor was that the petition was not duly signed as required by rule 125 of the Bankruptcy Rules, 1883, and Form No. 10 in the Appendix. (1) The Registrar overruled the objection, and made a receiving order.

The debtor appealed.

F. Cooper Willis, for the appellant. A bankruptcy petition by a creditor must be signed by the creditor himself; it cannot be signed by his attorney on his behalf. This is the effect of rule 125 of the Bankruptcy Rules, 1883, and Form No. 10.

[Bowen, L.J. Why should not a man sign a bankruptcy petition by his attorney as well as any other document?]

At any rate the power of attorney in the present case does not confer on the attorney power to sign a bankruptcy petition on behalf of the principal. The power to issue a writ does not necessarily imply a power to sign any document on behalf of the principal. This is the only legal proceeding which has to be commenced by the signature of a document by the person who commences it.

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(1) Rule 125 provides that "a creditor's petition shall be in Form No. 10 in the Appendix, with such variations as circumstances may require."

Form No. 10 provides that the petition shall be signed by the petitioner, and that his signature shall be attested by a witness, and the attestation clause contains the words "signed by the petitioner in my presence."

R. Vaughan Williams, for the creditor, was not heard.

BAGGALLAY, L.J. (after stating the facts and dealing with a question of fact which had been argued, continued:—) The next question is whether the signature of a bankruptcy petition by an attorney on behalf of the petitioner is a sufficient signature. I can entertain no doubt whatever that it is, provided that the power of attorney authorizes the signature; and I am satisfied that the words of the power in the present case were sufficient to authorize T. P. Richards to sign the petition on behalf of his principal. He is authorized by it "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings touching anything in which I or my ships, or other personal estate, may be in anywise concerned." The power of an attorney to act on behalf of his principal in bankruptcy matters has been undisputed ever since the decision of the Lords Justices in *Ex parte Frampton* (1), twenty-five years ago, in which it was held that, when a person on leaving the country had authorized another, either verbally or in writing, to act for him generally in his absence, the person so authorized could instruct a solicitor to appear on behalf of his principal to shew cause against an adjudication of bankruptcy against him. No doubt we shall be going a step further in holding that the power authorizes the signature of a document by the attorney on behalf of the principal, but the signature is essential to the doing of the act—the commencement of proceedings in bankruptcy—which is authorized. I agree with the Registrar.

BOWEN, L.J. I cannot entertain any doubt that Baggallay, L.J., is right in the view which he has expressed. The words of the power are wide enough to confer on the attorney authority to commence proceedings in bankruptcy by signing a bankruptcy petition on behalf of his principal.

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(1) 1 D. F. & J. 263.

FRY, L.J. I am entirely of the same opinion.

Solicitor for debtor: *J. T. Watson.*

Solicitors for creditor: *Hollams, Son, & Coward.*

W. L. C.

EX PARTE VAUGHAN. IN RE RIDDEOUGH.

Nov. 12.

Bankruptcy—Creditors' Deed—Act of Bankruptcy—Subsequent Bankruptcy of Debtor—Liability of Trustee under Deed to account to Trustee in Bankruptcy.

When the trustee under a creditors' deed takes possession of the debtor's property and carries on his business under the provisions of the deed, and the debtor is subsequently adjudicated a bankrupt on the act of bankruptcy committed by the execution of the deed, the trustee in the bankruptcy must elect to treat the trustee under the deed either as a trespasser or as his agent. If he elects to treat him as a trespasser, the trustee under the deed must deliver up to him all the property of the bankrupt of which he took possession, and which remains in his possession unconverted, and must pay him the value of that property which he has converted.

APPEAL from the Manchester County Court.

On the 14th of February, 1884, Robert Riddeough, a baker at Manchester, executed a deed by which, in consideration of a release and discharge from his creditors respectively therein contained, he conveyed and assigned all his property, real and personal, to Henry Vaughan absolutely, on trust for sale, conversion and collection. And it was thereby declared and agreed that until such sale it should be lawful for the trustee, and he was thereby empowered to carry on the business of the debtor, and to purchase goods on credit or otherwise, and to employ any part of the estate and effects therein, and to employ any person or persons (including the debtor) therein, at such salary as he might think fit, and otherwise conduct the same as fully in all respects as the debtor might have done if the deed had not been made, and should hold the profits upon trust, after payment of the expenses, for the creditors in manner thereinafter appearing. And it was thereby declared that the trustee should stand possessed of the proceeds of the estate, and the debts to be collected by him, in trust, after payment of certain costs, including the costs of the realization and winding-up of the estate, and after making any payments or allowances which would have preference or be entitled to be paid in full in case of bankruptcy, to pay, divide, and distribute the residue of the trust moneys amongst the creditors of the debtor as in bankruptcy, and to pay the surplus (if any) to the debtor. And it was provided that the trustee should act on the instructions and with the approval of three of the creditors, who should form a committee of inspection pursuant to resolution. This deed was assented to by a considerable number (but not by all) of the debtor's creditors.

Under it Vaughan took possession of the debtor's shops and property, and, with the consent of the committee of inspection, carried on his business, until the 9th of April, 1884, and in so doing he made purchases of fresh goods, such as flour and yeast, for the purposes of the business. On the 28th of February some of the creditors, who had not assented to the deed, presented a bankruptcy petition against the debtor in the County Court, alleging the execution of the deed as an act of bankruptcy, and on this petition a receiving order was made on the 7th of April. On the 9th of April an order was made that the bankrupt's estate should be wound up summarily under s. 121 of the Bankruptcy Act, 1883. On the 21st of April an adjudication of bankruptcy was made, and the official receiver thereupon became the trustee in the bankruptcy. On the 9th of April the official receiver took possession of the bankrupt's property. Vaughan afterwards rendered an account to the official receiver which shewed that he had received under the provisions of the deed the sum of £293 1*s.* 6*d.* This sum was made up of £18 18*s.*, "cash in hand from debtor;" the daily amounts of "cash sales" during the carrying on of the business; and one book debt. The account shewed per contra that Vaughan had expended sums amounting in the whole to 324*l.* 19*s.* 3*d.* This amount was made up of such items as wages, 44*l.*; possession money, 12*l.* 16*s.* 6*d.* to each of two men who were placed in possession of the bankrupt's two shops; and sums paid for new accounts for goods supplied, such as flour and yeast.

On the application of the official receiver the judge ordered that Vaughan should forthwith pay to him the sum of 293*l.* 1*s.* 6*d.*, admitted by the account to have been received by him under the deed, and should hand over to the trustee all other property of the debtor of which he held possession under and by virtue of the deed.

Vaughan appealed.

Bigham, Q.C., and *C. A. Russell*, for the appellant. The official receiver is only entitled to demand the debtor's property. He is not entitled to the flour which the trustee bought with his own money. He cannot take the loaves which were made with that flour, without allowing the trustee the cost of it, which he has paid out of his own money, or for which he is personally liable. If an action of trover had been brought by the official receiver against the trustee, he could have recovered damages for any property of the bankrupt which the trustee had taken possession of and converted, and he could have recovered in specie any property of the bankrupt which remained unconverted. But that is all he could have recovered, and his right is no higher now.

As to the other expenses which the trustee has incurred in carrying on the business, his right is perhaps not so clear. It may be said that, the deed being a nullity, the trustee was a mere volunteer, and he spent these moneys at his own risk. But it has been held that a trustee in bankruptcy (and the official receiver stands in the same position) being an officer of the Court, not only takes the bankrupt's estate subject to all equities, but ought to do that which the Court thinks right and reasonable, irrespective of hard technical rules of law or equity: *Ex parte James.* (1) That principle applies here. It is not suggested that the appellant has acted improperly in any way; it is only said that he has expended more than was necessary. He ought to be allowed the proper costs of carrying on the business, which he did at the instance of the bankrupt, whom the official receiver now represents. An inquiry as to the amount may be necessary. In *Ex parte the Official Receiver* (2), a case very like the present,

(1) Law Rep. 9 Ch. 609, 614.

(2) 32 W. R. 1001.

the only question raised was whether the trustee under a creditors' deed was entitled, as against the official receiver in the subsequent bankruptcy of the debtor, to remuneration for his personal services in carrying on the debtor's business; it was not disputed that he ought to be allowed the moneys which he had paid for carrying it on. In *Smith* v. *Dresser* (1) the trustee of an invalid creditors' deed was disallowed some costs incurred by him in getting in moneys of the debtor, but the trustee's claim there was really in the nature of remuneration for personal services. In *Woods* v. *Axton* (2) a bill was filed by an assignee in bankruptcy to set aside a creditors' deed which a bankrupt (a builder) had executed, and the Court, in setting aside the deed, allowed the trustees moneys which they had expended in completing unfinished houses. The official receiver is entitled only to such part of the property of the bankrupt as now remains in specie, and to damages for the conversion of such part as has been converted by the trustee, or, if he chooses to treat the trustee as having carried on the business as his agent, an account must be taken as between principal and agent, with proper allowances to the agent.

Sir F. Herschell, S.G., and *Pankhurst*, for the official receiver. The appellant dealt with the bankrupt's property with notice of an act of bankruptcy. He is not, therefore, entitled to very favourable consideration from the Court, or to have more than his strict legal rights. He has been a party to an attempt by the bankrupt and some of his creditors to defeat the bankrupt law. The property comprised in the deed was the property of the official receiver as trustee in the bankruptcy by virtue of the relation back of his title, and if the appellant has chosen to mix property which he himself bought with the property of the trustee, he has only himself to thank for the consequences. That cannot prejudice the position of the trustee.

[STEPHEN, J. How can the trustee acquire any right to what the appellant bought with his own money?]

The appellant has not attempted to distinguish in his account between the proceeds of the bankrupt's property and the proceeds of that which he himself bought, and he has lumped all his

(1) Law Rep. 1 Eq. 651. (2) W. N. 1866, p. 207.

expenses together. He is not entitled to charge against the trustee the sums which he expended in wages, for he had no authority to carry on the business.

[CAVE, J. Surely you can only claim the property of the bankrupt which the appellant actually received.]

The appellant cannot be allowed any deduction for what he has paid out of the bankrupt's money. In truth, he has not benefited the estate, for he has injured the goodwill of the business by having men in possession at the shops.

[STEPHEN, J. You may treat him as your agent, and then, no doubt, you would have a remedy against him for any misconduct in that character, or you can treat him as a trespasser and recover damages from him. But you cannot have it both ways.]

The official receiver is entitled to the value of the goodwill, stock, and everything of which the appellant took possession, and he is not entitled to any deduction.

[CAVE, J. I doubt whether you could recover the value of the goodwill in an action of trespass. I think you would only be entitled to damages for the loss of profits caused by the trespass.]

It is a serious matter if, by means of an abortive deed, the property of the creditors can be wasted without any remedy.

[CAVE, J. It seems to me that you cannot treat the appellant as to part of what he did as your agent, and as to the rest of it as a trespasser.]

He must account for the value of the property of which he took possession under the deed, including the goodwill of the business. The goodwill goes with the possession of the shop, and it belonged to the trustee in the bankruptcy by virtue of the relation back of his title.

[STEPHEN, J. You are attempting to carry the doctrine of relation back a long way.]

The trustee is, at any rate, entitled to everything which the appellant received by the sale of any part of the bankrupt's property, without any deduction.

[CAVE, J. You are claiming more than is allowed as against a trespasser who converts minerals in a mine; he is entitled to some allowances. You want to make none at all.]

If the appellant can shew that he has received anything by means of goods which he has himself bought, he may be entitled to an allowance for that. But he cannot be allowed anything which he has paid out of the bankrupt's estate, for he made the payments with notice of the act of bankruptcy.

[CAVE, J. You may have either an inquiry as to the value of the bankrupt's property of which the appellant took possession, or an inquiry as to the profits which he has made, or ought to have made, by carrying on the business.

STEPHEN, J. The principle on which the account is to be taken must depend on the way in which you elect to treat the appellant. If you choose to accept him as your agent, you will be entitled to an account of the carrying on of the business, and the profit which he has made, or ought to have made. If, on the other hand, you treat him as a trespasser, and claim reparation for the wrong which he has done you, I think you can only have compensation for that of which he took wrongful possession.]

We elect to treat him as a trespasser.

[STEPHEN, J. Then you are entitled to an account of the value of the property of the bankrupt of which the appellant took possession, and which he has since converted; the value, that is, at the time when the possession was taken.]

Sir F. Herschell, S.G. The inquiry ought to be at the expense of the appellant, because he meddled with the estate with notice of an act of bankruptcy. The deed is contrary to the policy of the bankrupt law, and the creditors' property ought not to be wasted in an inquiry which is rendered necessary by the commission of an act of bankruptcy with the knowledge of the man who asks for the inquiry.

[STEPHEN, J. I think the point is a weighty one, and one which may probably require consideration by the Court. A man who takes with notice of an act of bankruptcy cannot be favoured. Still we think that the question who is to pay the costs of the inquiry ought to be reserved till the inquiry is completed.]

Sir F. Herschell, S.G. The matter is of importance, because in many cases attempts are made to evade the provisions of the Bankruptcy Act.

[STEPHEN, J. Costs are the great instrument of correction in the hands of the Court, and certainly, if there is a deliberate attempt to tamper with the bankruptcy law, it would require a great deal of argument to induce us to give costs to a man who had done anything contrary to that law. But all the circumstances would have to be taken into consideration, and they ought all to be known to us before we express an opinion.]

Bigham, Q.C. The appellant was ordered to pay the costs in the Court below. This Court will reserve all the costs until after the inquiry.

PER CURIAM. All the costs will be reserved. The order, so far as it directs payment of the 293*l.* 1*s.* 6*d.*, will be discharged.

Solicitors for appellant: *Pritchard, Englefield & Co., for Boote & Edgar, Manchester.*

Solicitor for official receiver: *Solicitor to Board of Trade.*

W. L. C.

1884
Nov. 12.

Ex parte WOLVERHAMPTON AND STAFFORDSHIRE BANKING COMPANY. In re CAMPBELL.

Bankruptcy—Relation back of Trustee's Title—Payment of Bankrupt's Money to procure Withdrawal of Criminal Prosecution—Illegal Consideration—Right of Trustee to recover from Payee.

A banking company commenced a prosecution against a customer for having obtained credit from them under false pretences, which is, by s. 13 of the Debtors Act, 1869, made a misdemeanour. At this time the bank had notice of an act of bankruptcy committed by the customer. On the day on which the summons was to be heard by the magistrate, H. (whose wife was an aunt of the customer's wife) signed an undertaking that, if the magistrate would allow the summons to be withdrawn, he would pay the bank the sum which the customer had obtained from them by the false pretences. An application was made to the magistrate by the customer's solicitor to allow the summons to be withdrawn. The application was assented to by the bank's solicitor and was granted by the magistrate. H. then paid the money to the bank. The bank manager believed that H. was paying the money out of his own pocket. The customer was soon afterwards adjudicated a bankrupt, upon the act of bankruptcy of which the bank had notice. The trustee in the bankruptcy discovered that the money which H. had paid to the bank had been previously handed to him by the bankrupt's wife, she having, with the bankrupt's knowledge, taken it for the purpose of paying the bank out of a bag of money belonging to the bankrupt:—

Held, that, the consideration for the payment to the bank being the stifling of a prosecution, there was no legal consideration, and that, though H., being in pari delicto, could not have recovered the money from the bank, the trustee, to whom by virtue of the relation back of his title to the act of bankruptcy, the money really belonged, could recover it.

Ex parte Caldecott (4 Ch. D. 150) distinguished.

Leave to appeal to the Court of Appeal refused.

Appeal from the Wolverhampton County Court.

David Campbell was a potato merchant at Wolverhampton, and he kept an account with the Wolverhampton and Staffordshire Banking Company, which in December, 1883, was overdrawn. On the 22nd of December he had an interview with the manager of the bank, and requested him to cash two cheques for sums amounting to 96*l.* 4*s.* Ultimately the manager consented to do this, on Campbell's undertaking to pay 10*l.* into the bank at once, and to pay the rest of the 96*l.* 4*s.* on the 26th of December. The bank cashed the cheques, but Campbell did not pay in either the 10*l.* or the rest of the sum as he had promised. On the 29th of December he filed a liquidation petition of which the bank received notice the same day. On the 7th of January the bank obtained from the stipendiary magistrate at Wolverhampton the issue of a summons against Campbell, to answer a charge of having incurred a liability and obtained credit under false pretences, or by means of other fraud, contrary to sub-s. 1 of s. 13 of the Debtors Act, 1869, and the 11th of January was fixed for the hearing of the summons. On the 10th of January, Mr. Ebenezer Hunter, an uncle of Campbell's wife, had an interview with the bank manager, and endeavoured to induce him to withdraw the summons. The manager referred him to the solicitors of the bank. Hunter called on the solicitors, and they arranged with him that they would consent to an application to the magistrate on behalf of Campbell for the withdrawal of the summons, on his undertaking to pay the bank the 96*l.* 4*s.* and 10*l.* 10*s.* for costs. Hunter signed an undertaking to that effect. When the summons came on to be heard, Campbell's solicitor applied to the magistrate to allow it to be withdrawn. The solicitors of the bank consented to the application, and the magistrate allowed it. After this Hunter went to the bank and paid the 106*l.* 14*s.* He was asked how it was that he was putting his hand into his pocket in the matter, and he told both the manager and the solicitor that Mrs. Campbell was a favourite niece of his wife, and that he was anxious that her feelings should be spared.

The proceedings under the liquidation petition afterwards fell through, and on the 15th of January a receiving order was made against Campbell upon a creditor's petition, founded on the filing of the liquidation petition as an act of bankruptcy. Campbell was afterwards adjudicated a bankrupt, and the trustee in the bankruptcy applied to the county court for an order that the bank should pay the 106*l.* 14*s.* to him, on the ground that it formed part of the estate of the bankrupt. There was evidence that Hunter paid the 106*l.* 14*s.* to the bank in coin, which he had previously received from the bankrupt's wife, and that she had taken the money out of a bag of money which her husband had handed to her for the purpose. The bank manager and the bank's solicitor deposed that they believed that Hunter was paying the bank his own money, and that he did not state to them the source from which he had obtained it. The judge ordered the bank to pay the 106*l.* 14*s.* to the trustee, on the ground that money belonging to the bankrupt's creditors had been paid to stifle a prosecution. The bank appealed.

Cooper Willis, Q.C., and *Plumptre*, for the appellants. The money was given to Hunter by the bankrupt's wife, she having taken it out of a bag belonging to her husband. Hunter got a legal title to the money. At any rate, he represented to the bank that he was not paying the money to them as the bankrupt's agent.

[STEPHEN, J. What has the knowledge of the bank to do with the matter?]

Money can be followed only when there is a trust.

[CAVE, J. I do not agree to that proposition. If money is ear-marked it can be followed; although if it is used by the wrongdoer to pay a debt of his own, the creditor to whom it is paid may be entitled to keep it.]

Hunter paid the money in discharge of an obligation.

[STEPHEN, J. If he had paid the money in discharge of a debt of his own, or had paid it to the credit of his overdrawn current account with his bankers, it could not be followed. But he was under no obligation to pay the bankrupt's debt to the bank.]

He had given a written undertaking to pay it. A fraud committed by the bankrupt cannot destroy the title of a person who had no notice of the fraud.

[CAVE, J. If Hunter had paid the money away in discharge of a debt of his own the payee would have a good title to it, but surely not if he paid it away voluntarily.]

Hunter paid it away as his own money in discharge of his undertaking to the bank. There was nothing improper in the transaction so far as the bank were concerned.

[STEPHEN, J. Was there a good consideration as between Hunter and the bank for money paid to stifle a prosecution?]

No felony had been committed. It is not enough to shew that the bank were induced by the payment to abstain from prosecuting Campbell: *Flower* v. *Sadler*. (1)

[CAVE, J. It is a different thing if the payee enters into an agreement not to prosecute.]

Whatever difficulty there might have been in enforcing the agreement, Hunter paid the money to the bank in discharge of it. The bank must be entitled to retain the money as against him, and they had no notice that the money belonged to any one else. There is no authority for saying that, when a prosecution is only for a misdemeanour, and the tribunal sanctions its withdrawal, the prosecutor is bound to go on with it. The bank have got possession of the money, and it cannot be taken away from them. There has been no offence against the bankrupt law, and, therefore, the trustee stands in no better position than the bankrupt himself would have stood if there had been no bankruptcy: *Ex parte Caldecott*. (2) The bankrupt himself could not have recovered the money. There was no agreement to withdraw the prosecution; it was at the most an agreement not to press it.

Winslow, Q.C., and *J. E. Linklater*, for the official receiver, were not heard.

STEPHEN, J. My view of the case, putting it very shortly, is this:—As between Hunter and the bank there was no consideration at all for the payment, because it was made in pursuance of a corrupt bargain. He said to the bank, I will pay the money, if you will abandon the prosecution. That is what it comes to in substance. Hunter, therefore, conferred on the bank no better title to the money than he had himself, and he had no title to it, because it was given to him by Campbell's wife, with his knowledge, for the purpose of getting rid of the prosecution. Hunter in making the payment to the bank was really acting as Campbell's agent. Another point is this, and it establishes a distinction between the present case and *Ex parte Caldecott*. (2) The object of making the payment was to cheat the creditors of Campbell, to divert the money from the general body of the creditors in favour of these particular creditors. I think this was clearly an offence against the bankrupt laws; it was contrary to their policy. The bank were assisting Campbell in evading those laws, in order that he might escape the prosecution with which he was threatened.

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(1) 10 Q. B. D. 572.

(2) 4 Ch. D. 150.

CAVE, J. I am of the same opinion. A prosecution had been commenced by the bank against the bankrupt, either on good grounds or on bad grounds; it is not material to inquire which. If it was commenced on good grounds, it ought to have been proceeded with, and not made an instrument for obtaining payment of the bank's debt. If it was commenced on bad grounds, that makes the case, in my opinion, still worse for the bank, for then it must have been commenced only with the object of obtaining payment of the debt. I will, however, assume that the prosecution was honestly instituted. Then Hunter comes to the bank and offers to pay the debt if they will withdraw the prosecution, and they agree to this. This was an illegal contract, an agreement to interfere with the course of justice and stifle a prosecution. Consequently there was no consideration for the payment of the money. But, both parties being in pari delicto, Hunter could not have recovered the money from the bank. The money, however, was not the money of Hunter; it was furnished by Campbell, and, by virtue of the relation back of the trustee's title to the act of bankruptcy, it was the money of the trustee and had ceased to be the money of Campbell. This distinguishes the case from *Ex parte Caldecott* (1), for there no act of bankruptcy had been committed prior to the execution of the bill of sale the validity of which was in question, and the property was not that of the trustee at the time when the bill of sale was executed. There are no doubt cases in which money cannot be recovered by the rightful owner from a person who has obtained possession of it. This is one of the incidents attaching to a payment of current coin. If a thief steals a bank note and uses it in paying for goods which he buys, the rightful owner of the note cannot recover it from the vendor of the goods. But, in the present case, if Hunter had not paid the money away to the bank, it cannot be doubted that the trustee could have recovered the money from him. It is true that Hunter has paid away the money to the bank, but the bank have given no consideration for it. The only reason why Hunter could not recover it from the bank is that he is in pari delicto. But there is nothing to prevent the trustee from recovering the money from the bank, for nothing had happened to give the bank a better title to it than Hunter had. He had no title to it, and therefore the bank had none. The decision of the county court judge is right.

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(1) 4 Ch. D. 150.

Cooper Willis, Q.C., asked for leave to appeal to the Court of Appeal.

STEPHEN, J. We cannot give leave. The case is not one of any magnitude or of any general importance.

CAVE, J. I agree. There is not a large sum at stake, and the principle involved is one about which I do not entertain any doubt.

Solicitors for bank: *Ullithorne, Currey, & Villiers, for Neve & Cresswell, Wolverhampton.*

Solicitors for trustee: *Clarke, Woodcock, & Ryland, for Thorne, Smith and Thorne, Wolverhampton.*

W. L. C.

EX PARTE MAY. IN RE BRIGHTMORE.

Nov. 12.

Bankruptcy — Receiving Order — Jurisdiction—Petition presented in wrong Court—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 95, 97.

If a bankruptcy petition is by inadvertence presented in a wrong bankruptcy court, the court to which it is presented has jurisdiction to make a receiving order.

If, however, the petition is wilfully presented in a wrong court, this is a ground for dismissing it.

The Divisional Court made a receiving order, which it held that the county court ought to have made, and to which the debtor had raised no other objection than want of jurisdiction, giving leave to the debtor to apply afterwards to the Divisional Court to discharge the order on any ground arising since the hearing in the county court.

APPEAL from the Greenwich County Court.

On the 6th of August, 1884, R. J. May presented a bankruptcy petition in the Greenwich County Court against John Brightmore, who was described in the petition as of the Albert Works, North Woolwich, builder. The petition alleged that the debtor had for the greater part of six months next preceding the presentation of the petition carried on business at the Albert Works, "within the district of this court." A great part of North Woolwich is within the district of the Greenwich County Court, but the Albert Works are not, being in fact about 100 yards beyond the boundary of the district. This fact was not known to the petitioner at the time when he presented the petition, but he then believed that the debtor's works were within the district. The act of bankruptcy alleged by the petition was the failure of the debtor to comply with a bankruptcy notice issued out of the same court by the petitioner, and served on the debtor. The hearing of the petition was fixed for the 19th of August. On that day the petitioner, at the request of the debtor, consented to an adjournment of the hearing to the 26th of August, and on that day the petitioner consented to a further adjournment to the 2nd of September. On the 29th of August the debtor filed a notice that on the hearing of the petition he intended to dispute the same, on the ground that he did not reside or carry on business within the district of the Greenwich Court. He gave no notice of any intention to dispute the petitioner's debt or the act of bankruptcy. Until the filing of this notice the petitioner had believed that the debtor's place of business was within the district of the Greenwich Court. The petition came on for hearing on the 2nd of September before the deputy registrar, and the debtor was cross-examined and stated that he had not carried on business within the jurisdiction of the court, but that he carried on his business and also resided within the district of the Bow County Court. The hearing was adjourned to the 12th of September, to give the petitioner an opportunity of obtaining further evidence as to the debtor's place of business and residence. On the 12th of September the petitioner adduced no further evidence, and the registrar refused to make a receiving order, or to transfer the proceedings to the High Court (the Bow Court not having jurisdiction in bankruptcy), but dismissed the petition with costs. The creditor appealed.

F. Cooper Willis, for the appellant. The registrar ought to have made a receiving order. Though the petition had been presented in the wrong court, there was jurisdiction under s. 95 (1) of the Bankruptcy Act, 1883, to make a receiving order. Sub-s. 3 of that section was evidently intended to get over such a technical difficulty as this—it being discovered at the hearing of a bankruptcy petition that the debtor had not resided for the proper period within the district of the court in which the petition had been presented. A bankruptcy petition is a proceeding in bankruptcy. The words of sub-s. 3 must have some meaning.

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(1) Sect. 95 (1.) "If the debtor against whom or by whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district as defined by this Act for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in the district of any county court, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court.

(2.) "In any other case the petition shall be presented to the county court for the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition.

(3.) "Nothing in this section shall invalidate a proceeding by reason of its being taken in a wrong Court."

Sect. 97 (1.) Subject to the provisions of this Act, every court having original jurisdiction in bankruptcy shall have jurisdiction throughout England.

(2.) "Any proceedings in bankruptcy may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by any prescribed authority and in the prescribed manner from one court to another court, or may by the like authority be retained in the court in which the proceedings were commenced, although it may not be the court in which the proceedings ought to have been commenced."

Rule 16 of the Bankruptcy Rules, 1883. "Where the judge of a county court, or the judge or a registrar of the High Court, certifies that in his opinion a bankruptcy proceeding would be more advantageously conducted in some other court, the registrar shall, if the opinion is certified before the first meeting of creditors, transmit the certificate to the official receiver, who shall lay the same before such meeting, and if it has been certified after such meeting, he shall transmit a copy of such certified opinion to the trustee, if there be one, and if not to the official receiver, who shall thereupon summon a meeting of creditors to consider the same."

Rule 17. "If within seven days after the first meeting, or, in any other case, within fourteen days after transmitting such notice to the official receiver, or trustee, no resolution of the creditors objecting to such transfer shall be received by the Court through the registrar, the transfer may be made accordingly; but if the creditors have so objected, the transfer shall not be made."

[STEPHEN, J. You interpret sub-s. 3 as meaning that, though you ought to present your petition in the court specified in sub-s. 1 or sub-s. 2, it does not matter whether you do so or not?]

Not if the petition is presented in the wrong court by inadvertence. Here the debtor misled the creditor by the description which he gave of himself.

But the registrar was asked, if he did not make a receiving order, at any rate not to dismiss the petition, but to transfer the proceedings to the right court. He had jurisdiction to do this under s. 97, sub-s. 2. The object of fixing a particular court for the presentation of a petition is, that the debtor's estate may be administered with the greatest advantage to his creditors. In the present case the debtor resided only just outside the district, and the mistake arose through mere inadvertence. The fact was not known to the creditor until the notice of the 29th of August was given to him. The debtor did not raise the objection at first. The result of dismissing the petition is that, though the debtor does not dispute the debt, and is not able to pay it, it is six weeks before his estate can be administered. The object of the Act is that the estate of an insolvent debtor should be distributed among his creditors as quickly as possible.

Cooper Willis, Q.C., and *Garrett*, for the debtor. There was no power to present the petition in the Greenwich Court, and it would not be right to transfer the proceedings. There is no evidence of misapprehension on the part of the creditor. Sect. 97 says that proceedings may be transferred "by any prescribed authority and in the prescribed manner." That means in the manner prescribed by the rules made under the Act; s. 168. The rules which apply are rr. 16, 17, of the Bankruptcy Rules, 1883, and those rules shew that a transfer cannot be made until after a receiving order has been made. There was no jurisdiction to make a receiving order. Sub-s. 3 of s. 95 is simply a statutory recognition of the principle which was, under the Bankruptcy Act, 1869, laid down by the Courts of Common Pleas and Exchequer Chamber in *Revell* v. *Blake.* (1) In that case an adjudication had been made on a petition presented in a wrong court, and it was held that, the adjudication having been made, it was not void, and that it could be questioned only by way of rehearing or appeal in the Court of Bankruptcy itself. In the present case the jurisdiction of the Court to make a receiving order is founded on the fact of residence or carrying on business within its district. Sub-s. 3 of s. 95 is not intended to enable a creditor to take proceedings in a wrong court, but only to validate orders actually made in a proceeding wrongly commenced. The argument on the other side reduces sub-ss. 1 and 2 of s. 95 to a nullity. The allegations of the petition have to be verified by affidavit; r. 130. The making of an order to transfer the proceedings is a matter within the discretion of the judge, and this Court will not interfere.

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(1) Law Rep. 7 C. P. 300; Law Rep. 8 C. P. 533.

STEPHEN, J. Taking ss. 95 and 97 together, it appears to me that the registrar had jurisdiction to make a receiving order. The words of sub-s. 3 of s. 95 are perhaps not so clear as might have been desired, but they seem to me sufficient to shew that, if the registrar had made a receiving order without objection, it would not have been invalidated by reason of the proceedings having been taken in the wrong court. A good deal of light is thrown on the matter by the wording of s. 97. I think, therefore, that the registrar had authority to make a receiving order, and if he had done so he would then have been in a position to act under sub-s. 2 of s. 97. This, however, he has not done. The whole objection is of the smallest possible kind. There is no reason, so far as we know, why the matter should not be decided in the Greenwich Court. I am clearly of opinion that the registrar could have made a receiving order. Whether we make the order now or remit the case to him, must depend upon whether the material facts are all in evidence.

CAVE, J. I am of the same opinion. I think ss. 95 and 97 were intended to remove just such a difficulty as that which has arisen here. It may not unfrequently happen that a petitioning creditor is in bonâ fide ignorance of the district in which his debtor has been residing, and that, after he has taken the preliminary step, he may find himself in a difficulty by reason of his having presented his petition in the wrong court. When this has been done through inadvertence, it appears to me that, by the very terms of sub-s. 3 of s. 95, and of s. 97, the Court in which the petition has been presented has authority to make a receiving order. In the present case I think that the petition was presented in the wrong court by inadvertence; if this had been done wilfully that would be a ground for dismissing the petition. But there is no suggestion of that. I think the proper course would have been for the registrar to hear the petition and then decide on the merits whether a receiving order ought to be made. If there is no objection but this question of jurisdiction, I think we ought to make the order now. If there is any other objection the case should go back to the registrar.

F. Cooper Willis. This was the only point taken in the county court.

Cooper Willis, Q.C. This point was taken because it was considered fatal to the petition. There ought to be an affidavit by the creditor that the debt is due at the time when the receiving order is made.

[CAVE, J. Due, that is, at the time of the hearing of the petition. We ought to make the order which the registrar ought to have made. You did not deny the debt.]

F. Cooper Willis. The debt was not disputed on the bankruptcy notice.

STEPHEN, J. We must make a receiving order. The debtor can, if he chooses, apply to discharge it on any ground which has arisen since the hearing in the county court.

CAVE, J., concurred.

Leave was then given to the debtor to serve short notice of an application to this Court to discharge the receiving order, the proceedings not to be stayed in the meantime.

Solicitors for creditor: *May, Sykes, & Batten.*
Solicitor for debtor: *A. G. Ditton.*

W. L. C.

Ex parte ALLAM. In re MUNDAY.

1884
Nov. 12.

Bankruptcy—Bill of Sale—Statement of Consideration—Power to seize—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8—*Bills of Sale Act,* 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9.

On the 12th of February a bill of sale was executed to secure an actual advance in cash of 1500*l.* After its execution it was discovered that it contained some clauses which made it void under the Bills of Sale Acts. It was thereupon cancelled, and a new bill of sale was, on the 16th of February, executed in substitution for the first, and was registered on the 18th of February. The second deed contained nothing to shew that it was given in place of a prior bill of sale, but it purported to be given "in consideration of 1500*l. now paid*" by the grantee to the grantor :—

Held, that the consideration was truly stated, and that it was not necessary to state the whole history of the transaction.

The deed empowered the grantee to seize the property in case (inter alia) the grantor "shall do or suffer any matter or thing whereby he shall become a bankrupt" :—

Held, that this event was in substance equivalent to the event "if the grantor shall become a bankrupt" in which, by s. 7 of the Bills of Sale Act, 1882, a grantee is permitted to seize under a bill of sale, and that consequently the bill of sale was not void under s. 9.

Appeal from the Winchester County Court.

At the beginning of February, 1884, James Munday, a farmer at Newton Valence, in Hampshire, owed his bankers a considerable sum of money, and they were pressing him for payment. He consulted his solicitor, and ultimately Albert Allam agreed to advance him 1500*l.* on the security of a bill of sale of his furniture, live and dead stock, and growing crops. A bill of sale was accordingly prepared by the solicitor, and was executed by Munday on the 12th of February, and on that day Allam gave him a cheque for 1500*l.* After the execution of the deed, and before it had been registered, the solicitor discovered that it contained some provisions which would render it void under the Bills of Sale Acts, and he then prepared a new bill of sale in substitution for it, and the old one was cancelled. The new deed was executed by Munday on the 16th of February, and was duly registered on the 18th of February. The new bill of sale contained nothing to shew that it was given in substitution for a previous bill of sale, but it was expressed to be given "in consideration of the sum of 1500*l.* *now paid* to the said James Munday by the said Albert Allam." It contained a power authorizing the grantee to enter and take possession of the property in various events, one of which was if the grantor "shall do or suffer any matter or thing whereby he shall become a bankrupt." The grantee received no fresh consideration when the second bill of sale was executed. Shortly afterwards he was adjudicated a bankrupt, and the trustee in the bankruptcy applied to the Court for an order declaring the bill of sale void against him on various grounds, one of which was that the consideration for the deed was not truly stated in it, in compliance with the provisions of s. 8 of the Bills of Sale Act, 1878, and another was that it contained clauses contrary to the provisions of ss. 7 and 9 of the Bills of Sale Act of 1882. The judge made an order declaring the bill of sale void as against the trustee, on the ground that the consideration was not truly stated. He was of opinion that the second bill of sale ought to have contained some statement in it to shew that it was connected with the first which had been cancelled. The grantee appealed.

G. G. Greenwood, for the appellant. It is not suggested that there was any fraud in the giving of the second bill of sale, and the county court judge found that there was not. It was executed only for the purpose of correcting a material error in the first, and this is permitted by s. 9 of the Bills of Sale Act, 1878. The second deed was treated as part of the same transaction as the first, and it was not considered necessary to go through the form of returning the 1500*l.* and readvancing it. The advance of the 1500*l.* was the real consideration for the second bill of sale, and this consideration is truly stated. The old consideration remained, though the first bill of sale was cancelled: *Smale* v. *Burr* (1), *Ramsden* v. *Lupton* (2). All that the Bills of Sale Act requires is that the true legal or business effect of the transaction should be stated; it is not necessary that every part of the transaction should be stated with strict accuracy: *Credit Co.* v. *Pott* (3); *Ex parte Johnson.* (4)

(1) Law Rep. 8 C. P. 64.
(2) Law Rep. 9 Q. B. 17.
(3) 6 Q. B. D. 295.
(4) 26 Ch. D. 338.

Winslow, Q.C., and *S. Lynch*, for the trustee. *Smale* v. *Burr* (1) and *Ramsden* v. *Lupton* (2) were decided before the Act of 1878. The Bills of Sale Act which was then in force did not require the consideration to be set forth in a bill of sale. The object of requiring the consideration to be stated is thus stated by Brett, M.R., in *Davis* v. *Burton* (3), "first, that the borrower should understand the nature of the security which he was about to give for the debt due from him; and secondly, that a creditor upon merely searching the register should be able to understand the position of the borrower, and should not be compelled to go to a solicitor in order to get counsel's opinion as to the meaning of a security already created by the borrower."

It is most important that creditors should know when their debtor really got the money which is said to have been the consideration for a bill of sale. The deed might have been a security for a previously existing debt, and an act of bankruptcy, if it was an assignment of the whole of the debtor's property. That is what the transaction in the present case really amounted to. There was no present advance when the second deed was executed. The money was advanced on the 12th of February and security was then given for it; how can it be truly said that there was any fresh advance on the 16th of February? Suppose the first bill of sale had been given on the 1st of January and the mistake had not been discovered, or the second bill of sale given till the 31st of December; could it then have been truly stated that the second bill was given in consideration of money then advanced?

[CAVE, J. The Act does not require the history of the transaction to be stated, but only the consideration for the bill of sale. The only reason why the debtor executed the bill of sale was because the 1500*l.* had been lent to him.

STEPHEN, J. The security for the 1500*l.* was given in the first instance by a document which on account of some error had afterwards to be cancelled, and then a security was given by a proper document. It was really all one transaction. I should say that the consideration is truly stated in the second deed, though the whole history of the transaction is not completely stated.]

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(1) Law Rep. 8 C. P. 64.
(2) Law Rep. 9 Q. B. 17.
(3) 11 Q. B. D. 537, 539.

The consideration was really an existing debt of 1500*l*. In *Ex parte Berwick* (1), Bacon, C.J., held that, a bill of sale having been given to secure a past debt contracted in instalments, the statement in the deed that it was given "in consideration of 65*l*." (the amount of the instalments) "now paid" to the grantor was not a true statement of the consideration. In *Credit Co.* v. *Pott* (2), the decision was based on the recitals in the deed, which stated the real facts. The Court held that what took place amounted to an agreement to pay off the old debt.

Another objection to the bill of sale is this. S. 9 of the Bills of Sale Act of 1882 provides that "a bill of sale given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed," and that form provides that the chattels assigned by the bill "shall not be liable to seizure by the grantee for any cause other than those specified in s. 7 of the Act." One of the causes mentioned in s. 7 is—"if the grantor shall become a bankrupt." Under that provision there could not be a seizure until an adjudication of bankruptcy was made against the grantor. Under the power in this bill of sale the grantee could seize as soon as an act was done by the grantor upon which an adjudication was afterwards made against him.

[STEPHEN, J. It seems to me that the power is in substance in accordance with s. 7.

CAVE, J. The power would not arise until the grantor became a bankrupt.]

A third objection is that the goods were in the order or disposition of the bankrupt at the commencement of the bankruptcy.

STEPHEN, J. I am of opinion that the appeal must succeed, and for reasons which I have already indicated during the course of the arguments. It seems to me that the consideration is truly set forth in the bill of sale, although the whole history of the transaction is not completely stated in it. Upon the second point, viz., that the power to seize the goods is not in precise conformity with the terms of s. 7 of the Bills of Sale Act of 1882, I think that there is no substantial difference between them.

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(1) 29 W. R. 292.

(2) 6 Q. B. D. 295.

With regard to the third point, that the goods were in the order or disposition of the debtor, it was put forward so faintly that I do not see what I can say about it, and moreover we have no materials before us upon which we could send the case back to the county court on that point.

CAVE, J. I am of the same opinion. The statute requires the consideration to be truly stated, with the intention, no doubt, not only of preventing fraud upon creditors, but also of preventing hardship upon ignorant debtors. But to hold in the present case that the consideration is untruly stated would really be to destroy a perfectly honest and bonâ fide deed. There was an agreement that the grantor should have a present advance of 1500*l.*, and should give a bill of sale as security for it. He got the money, and he gave the bill of sale. It was afterwards found to be worthless, and it was replaced by the present bill of sale, which states the consideration as money "now paid." In my opinion that does properly describe the consideration. The deed was given, not to secure a past debt, but for a present advance. In my opinion, if the consideration had been stated in any other way it would have been wrongly stated. As to the power to seize, though some unnecessary words have been used, I am of opinion that it is in substance equivalent to that which is contained in s. 7 of the Act. As to the last point, it was not taken in the Court below; and no evidence upon the point seems to have been adduced on either side. If taken in the Court below, evidence might have been adduced by the bill of sale holder to shew that the goods were not in the order and disposition of the bankrupt. We ought not to remit the case to the county court to enable the trustee to raise an objection which he omitted to raise at the hearing, and which, if then raised, might, for all we know, have been disproved.

Solicitors for appellant: *Ford, Lloyd, & Co., for Downie, Alton.*

Solicitors for trustee: *Johnson & Weatheralls, for Potter, Farnham.*

W. L. C.

1884
Nov. 20.

Ex parte LEICESTERSHIRE BANKING COMPANY. In re DALE.

Bankruptcy—Appeal—Costs—Official Receiver.

An order made by a county court, on the application of the official receiver, setting aside a payment made by a debtor as a fraudulent preference, having been reversed on appeal:—

Held, that the costs of the appellants and of the official receiver, in both courts, must be paid out of the debtor's assets, the costs of the appellants having priority.

Appeal from the Leicester County Court.

This was an appeal by the above company from an order which declared a certain payment made to them by the debtor to be void against the official receiver, as being a fraudulent preference.

Winslow, Q.C., and *H. Reed*, for the appellants.

Muir Mackenzie, and *W. E. Davidson*, for the official receiver.

The Court (Mathew and Cave, JJ.), allowed the appeal, with costs in both courts.

Winslow asked for a personal order against the official receiver for payment of the costs, leaving him to his indemnity out of the assets, in accordance with the practice under the Bankruptcy Act, 1869, when a trustee in bankruptcy was an unsuccessful litigant.

The Court ordered the costs, both of the appellants and of the official receiver, in both courts, to be paid out of the assets, the costs of the appellants to have priority.

Solicitors for banking company: *R. Smith & Wilmer, for W. Llewellyn Salusbury, Leicester.*

Solicitor for official receiver: *Solicitor to Board of Trade.*

Note.—Vide *Ex parte Angerstein*, Law Rep. 9 Ch. 479; *Pitts* v. *La Fontaine*, 6 App. Cas. 482.

W. L. C.

[IN THE COURT OF APPEAL.]

1884
Nov. 21.

Ex parte HEYWORTH. In re RHODES.

Bankruptcy—Bankruptcy Petition—Act of Bankruptcy—Failure to comply with Bankruptcy Notice to pay Judgment Debt—Appeal pending from Judgment—Staying Proceedings—Discretion of Registrar—Appeal—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *subs.* 4.

The Court of Appeal will not interfere with the exercise of discretion by the registrar, under subs. 4 of s. 7 of the Bankruptcy Act, 1883, in adjourning the hearing of, or dismissing, a bankruptcy petition founded on non-compliance with a bankruptcy notice in respect of a judgment debt, when an appeal is pending from the judgment, unless it is clear that the registrar could not have been right.

If the appeal appears to be a bonâ fide one, the hearing of the bankruptcy petition ought to be adjourned.

If the appeal is evidently frivolous, a receiving order ought to be made, notwithstanding its pendency.

On the 15th of October, 1884, Eli Heyworth presented a bankruptcy petition against C. H. Rhodes. The petition alleged that Rhodes was indebted to the petitioner "in the sum of 138*l.* 3*s.* 4*d.*, being as to part thereof, namely 104*l.* 6*s.*, the amount due on a final judgment obtained by me against the said C. H. Rhodes in the High Court of Justice, dated the 8th of July, 1884, whereon execution has not been stayed, and as to 33*l.* 17*s.* 4*d.*, the remainder thereof, being the amount of the taxed costs occasioned by an application for a rule of the High Court, dated the 8th of July, 1884, ordering a writ of prohibition to issue, directed to the Lord Mayor of London and the said C. H. Rhodes, to prohibit them from further proceeding in a certain action in the Mayor's Court." The act of bankruptcy alleged was the failure of Rhodes to comply with a bankruptcy notice which Heyworth had served on him for the 138*l.* 3*s.* 4*d.*

From the evidence it appeared that Heyworth had, on the 25th of April, 1883, obtained from a Divisional Court a rule nisi for a prohibition of the proceedings in an action for wrongful dismissal which Rhodes had brought against him in the Mayor's Court.

On the 12th of June, 1883, cause was shewn against the rule nisi, and, there being some facts in dispute, it was then ordered

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that an action in prohibition should be tried, to determine whether the cause of action alleged by Rhodes in the action in the Mayor's Court had arisen within the jurisdiction of that Court. The action was tried before Hawkins, J., in February, 1884, and he, on the 8th of July, 1884, decided that the Mayor's Court had no jurisdiction, and directed judgment to be entered for the plaintiff (Heyworth) with costs. The rule nisi was then made absolute. Rhodes appealed from the decision of Hawkins, J., and the appeal was pending when the bankruptcy petition came on to be heard. Execution on the judgment had not been stayed pending the appeal. Rhodes opposed the making of a receiving order, on the ground that the appeal was pending. Mr. Registrar Hazlitt ordered that "it appearing that an appeal brought by the debtor is now pending in relation to the judgment on which the bankruptcy notice herein was founded, it is ordered that the further hearing of this petition be adjourned generally, with liberty to apply."

Heyworth appealed.

Rolland, for the appellant. The pendency of the appeal from the judgment is not a sufficient reason for adjourning the hearing of the petition; at any rate, without security being given for the judgment debt: *Ex parte Phippen* (1). The debtor ought to have applied for a stay of execution under the judgment; this he has not done. No doubt the registrar has, under s. 7, sub-s. 4 (2), of the Bankruptcy Act, 1883, a discretion in the matter, but the exercise of the discretion is the subject of an appeal.

Morton Smith, for the debtor. The question on the appeal is whether the action was within the jurisdiction of the Mayor's Court; and this depends upon the place in which the alleged wrongful dismissal took place.

BAGGALLAY, L.J. It was always the recognised practice under the Bankruptcy Act of 1869, and I can see no reason why it should not continue to be the practice under the present Bankruptcy Act, that, when a petitioning creditor's debt was founded on a judgment (and I assume that the present appellant's debt is a judgment debt) and an appeal was pending from the judgment, it was a matter for the discretion of the registrar whether he would at once adjudicate the debtor a bankrupt, or stay the proceedings on the petition pending the appeal. In the present case the petitioning creditor's debt is an amount payable to him by the debtor by reason of certain proceedings in prohibition. Against the judgment or order under which that sum is payable an appeal is pending, and a possible result of the appeal is that there may be no petitioning creditor's debt at all. I do not stop to consider whether this is a probable result or not. But the bonâ fide character of the appeal is an essential matter to be considered. If the Court was satisfied that the appeal was not bonâ fide, the discretion under sub-s. 4 of s. 7 ought to be exercised by making a receiving order on the petition. In the present case it appears to me that there is a substantial question raised by the appeal, and it is possible that on the hearing of the appeal the alleged debt may be got rid of altogether. I think the registrar has exercised a very wise discretion. He has not adjourned the petition until after the appeal has been heard; he has only adjourned it generally, with liberty to apply, so that, if the appeal is not duly prosecuted, the petitioner can apply to the Court to allow him to proceed with the petition. I think the registrar's order is perfectly right.

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(1) W. N. 1883, p. 71.

(2) Sect. 7, subs. 4: "When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure, or compound for a judgment debt, the Court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment."

Bowen, L.J. I am of the same opinion, assuming that the appellant is right in saying that these costs are payable to him under a "final judgment" within the meaning of sub-s. 1 (*g*) of s. 4. I am, however, by no means satisfied that a person who has obtained an order of this nature is "a creditor who has obtained a final judgment" within that sub-section. I express no decided opinion on this point now; I wish to reserve the right of doing so when the point shall arise for decision. But, assuming that the appellant is right in saying that this sum is due to him on a final judgment, the judgment of Hawkins, J., is under appeal, and the question is, whether the pendency of this appeal justified the registrar in ordering the petition to stand over for the present. This was an exercise of the registrar's discretion. It cannot, of course, be said that the mere fact that an appeal is pending from the judgment, gives the debtor an absolute right to a stay of proceedings, or to have the petition dismissed. But, under sub-s. 4 of s. 7, the registrar is clothed with a discretion; he has an absolute discretion to consider what is the best thing to be done under the circumstances. And it would be impossible for this Court to interfere with the exercise of his discretion unless we were satisfied that the registrar could not have been right. If it could be shewn that the appeal from the judgment must be a frivolous one, we might reverse his decision. But, so long as he might reasonably have come to the conclusion that there was a reasonable ground of appeal, it would be a monstrous thing that a receiving order should be made while the appeal is pending.

Fry, L.J. I am entirely of the same opinion. In all cases of this kind I should be very unwilling to interfere with the exercise of the registrar's discretion. But in the present case I think he has exercised his discretion rightly. If the appeal from the judgment appeared to be an entirely frivolous one, the proceedings on the petition ought not to be stayed, but that is not so here. The present appeal, however, is entirely frivolous, and it must be dismissed with costs.

Solicitors for creditor: *Shaw & Tremellen.*
Solicitors for debtor: *Walker, Son, & Field.*

W. L. C.

SAYWOOD *v.* CROSS.

1884
Nov. 24.

Practice—Costs—Action of Contract which could not have been brought in County Court—Judgment for Sum not exceeding 50*l.—Order LXV., r.* 12.

By Order LXV., rule 12, in actions founded on contract in which the plaintiff recovers by judgment or otherwise a sum (exclusive of costs) not exceeding 50*l.*, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a county court, unless the Court or a judge otherwise orders:—

Held, that this rule does not apply to actions which could not have been brought in a county court.

IN an action for breach of promise of marriage the plaintiff claimed 200*l.* damages; and at the trial, before Smith, J., and a jury, obtained a verdict and judgment for 20*l.*

A master taxed the plaintiff's costs on the High Court scale, being of opinion that rule 12 of Order LXV. did not apply to actions which could not have been brought in the county court.

Upon a summons to review the taxation, Wills, J., in chambers, referred the matter to a Divisional Court.

J. C. Earle, for the defendant. It is submitted that rule 12 of Order LXV. applies to an action for breach of promise of marriage, which could not have been brought in the county court; though, had the claim not exceeded 50*l.*, it could have been remitted under s. 7 of the County Courts Act, 1867 (30 & 31 Vict. c. 142). The terms of rule 12 are wide enough to include such an action. In *Sampson* v. *Mackay* (1) the construction contended for here was placed upon s. 5 of the County Courts Act, 1867, which enacts that if the plaintiff in any action commenced after the passing of the Act in one of the Superior Courts shall recover a sum not exceeding 20*l.* in contract, and 10*l.* in tort, he shall not be entitled to any costs of suit unless the judge certify that there was sufficient reason for bringing the action in the Superior Court; and the Court held that s. 5 applied to actions which could not have been brought in the county court; and the fact that an action could not have been so brought was said to

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(1) Law Rep. 4 Q. B. 643.

1884

SAYWOOD v. CROSS.

be only one element in determining the exercise of the Court's discretion.

Cluer, for the plaintiff, was not heard.

MATHEW, J. I am of opinion that rule 12 of Order LXV. does not apply, and was not intended to apply, to actions for breach of promise of marriage. The obvious intention of the rule is to coerce plaintiffs into bringing actions in the county court. This action could not have been brought there. The plaintiff is by statute entitled to recover his costs in the Superior Court, unless the County Court Acts apply to deprive him of his right. If rule 12 had the operation contended for, I should be inclined to doubt whether it would not be ultrà vires. *Sampson* v. *Mackay* (1) was decided upon a different statute, and has no application to this case. The motion must be dismissed.

SMITH, J. I am also of opinion that rule 12 of Order LXV. does not apply to actions for breach of promise of marriage. The effect of the rule is that if a plaintiff chooses to bring an action in the Superior Court which he could have brought in the county court, he shall not have his costs unless he recover a specified sum. Here the action could not have been brought in the county court.

Appeal dismissed.

Solicitor for plaintiff: *C. H. Preston.*
Solicitors for defendant: *Postans & Landon.*

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(1) Law Rep. 4 Q. B. 643.

W. A.

PRITCHARD *v.* PRITCHARD.

1884
Dec. 3.

Practice—New Trial—Action remitted to the county court for trial of issues under 19 *&* 20 *Vict. c.* 108, *s.* 26—*Order XXXIX. of the Rules of* 1883—*Order LII. r.* 1—*County Courts Act*, 1875 (38 *&* 39 *Vict. c.* 50), *s.* 6.

Rules 3 and 4 of Order XXXIX., and Rule 1 of Order LII. (of 1883), have no application to cases sent for trial to a county court under 19 & 20 Vict. c. 108, s. 26; applications for new trials, therefore, are still regulated by the old practice.

This action was commenced in the High Court, and remitted for trial to the Bangor county court under 19 & 20 Vict. c. 108, s. 26. (1) The trial took place on the 19th of May, 1884, by the judge without a jury, when a verdict was found for the plaintiff. Notice of motion for a new trial on the ground of misdirection was given on the 26th of May. Upon the motion coming on for argument on the 28th of November,

J. H. Williams, for the plaintiff, objected that the application was too late and not made in the proper form. He submitted that the action being still an action in the High Court, the application should have been made in the manner and within the time prescribed by the old practice, and not under the Rules made under the Judicature Act, which apply to actions tried in the High Court only, and not to causes tried in a county court. He referred to *London* v. *Roffey* (2), *Swansea Co-operative Building Society* v. *Davies* (3), and *Mathews* v. *Ovey.* (4)

(1) 19 & 20 Vict. c. 108, s. 26, "where in any action of contract brought in any superior Court the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by payment into court, payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*, a judge of a superior Court, on the application of either party after issue joined, may in his discretion and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name; and thereupon the plaintiff shall lodge with the registrar of such court such order and the issue; and the judge of such court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties or their attorneys; and after such hearing the registrar shall certify the result to the Masters' office of such superior Court, and judgment in accordance with such certificate, may be signed in such superior Court."

(2) 3 Q. B. D. 6.

(3) 12 Q. B. D. 21.

(4) 13 Q. B. D 403.

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PRITCHARD v. PRITCHARD.

Marshall, for the defendant. *Mathews* v. *Ovey* (1) does not apply. There the action was a county court action proper under the Employers Liability Act, 1880, in which the mode of appealing is prescribed by the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6 (2). Here, however, the case was commenced by writ in the High Court, and still remains for all purposes except the trial of the issue a record of the High Court; every thing except the actual trial takes place in the county court: *Balmforth* v. *Pledge* (3). The observations of the Master of the Rolls in *Mathews* v. *Ovey* (4) apply only to actions which are commenced in the county court. This case, therefore, is clearly within Order XXXIX., rules 3, and 4.

[LORD COLERIDGE, C.J. Order XXXIX. can have no application to cases commenced in the High Court, and sent *for trial of the issues* to the county court. "Court" or "judge" means the High Court or a judge of the High Court.]

If the defendant is thrown back upon the old practice under rule 50 of Hilary Term, 1853, which required the motion to be made within four days of the day of trial, he should at all events be allowed a reasonable time, seeing that he has been misled by solemn decisions of the Divisional Courts.

[MATHEW, J., referred to *Johnson* v. *Warwick* (5), where the Court relaxed the stringency of that rule in a case where the motion had by mistake of counsel been made in the wrong Court, and allowed the mistake to be corrected after the lapse of the four days.]

LORD COLERIDGE, C.J. Four other cases in this day's list are open to the same objection that has been taken in this case; and we are informed that there are still others on the general list. We will, therefore, take time to consider, and settle the course proper to be adopted under the circumstances.

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(1) 13 Q. B. D. 403.

(2) 38 & 39 Vict. c. 50, s. 6, "in any cause, suit, or proceeding, other than a proceeding in bankruptcy, tried or heard in any county court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision, by motion to the Court to which such appeal lies, instead of by special case, such motion to be ex parte in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings, as to the Court to which such motion shall be made shall seem fit."

(3) Law Rep. 1 Q. B. 427.

(4) 13 Q. B. D. 406.

(5) 17 C. B. 516.

Cur. adv. vult.

1884. Dec. 3. LORD COLERIDGE, C.J. This case of *Pritchard* v. *Pritchard*, is one which in its circumstances governs a number of cases before us; and, as there may be other cases of a similar nature, we have taken time to consider what we should do. On the one hand, we do not want to introduce a lax practice; and, on the other, if suitors or the Bar have been really misled by the action of this Court, we do not want to hold the rule so tight that anything like hardship or injustice should result.

Now, these applications were set down as motions for new trials in the county court; and in consequence of the decision of this Court the course was to treat these actions as if they had been actions in the High Court itself, and as if the new Rules and Orders applied in such cases, and therefore the practice in relation to them had been governed by the new Rules. It must be admitted that, as far as this Court is concerned, there was very good reason for so treating the matter, because there was an express decision of this Court, and there had been several decisions following it, in which it had been assumed that these Rules did apply to county court actions (I use the words on purpose in a general sense, and I do not forget the distinctions between them), and that therefore the procedure under them was to be according to the new Rules.

But, further investigation and the judgment of the Court of Appeal in *Mathews* v. *Ovey* (1) has satisfied me, not only that the Court of Appeal had the power but that they were quite right to come to the judgment they did, whereby that mistaken view of ours has been corrected. It may be that, if proper care had been taken, the correction of our view by the Court of Appeal ought to have been known by those who advised the parties in these cases: but it apparently was not; and it would be hard that suitors should suffer by a very explainable and indeed excusable mistake.

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(1) 13 Q. B. D. 403.

Now, I said that I used the expression "county court actions" in a general sense, because I did not forget that county court actions, when you come accurately to distinguish them, are to be put under three separate heads. There is the county court action proper, in which the proceeding is initiated by plaint in the county court, and which is governed by statute, the practice of which is settled, and in regard to which no question in these cases arises: that is, a county court action proper. Then there is also the case in which an action is brought in the High Court, and the action is transferred to the county court (1), and becomes then by the procedure followed a county court action proper; and the same rule which applies to the first class of cases applied to that. Then there is a third class of cases,—to which, I understand, all the cases now before us belong,—that is, where an action is commenced in the High Court, and where under statutory provisions the action is retained in the High Court and is still a High Court action, and the issue or issues only is or are sent down for trial in the county court, the action itself still remaining in the High Court. (2)

Now, it is to this last class of actions that we, a little hastily perhaps, thought that the Rules in question applied, and that the same time and the same procedure was applicable to such actions as would be applicable in the case of an action brought in the High Court. But, upon consideration, that does not appear to be so. The Rules shew, when they come to be looked at, that the words "judge" and "action" are limited to judges and actions contemplated and dealt with by the Rules themselves, and that applications in these cases are applications to judges or to courts dealt with by those Rules. The judges appealed from in these cases, and the applications to these judges, are not judges nor applications contemplated by those Rules; and it is plain therefore that, upon a careful consideration of them, these Rules do not apply to the third class, I mean as far as they enact time and notice and procedure of that description, any more than they apply to the first. It follows, therefore, that the procedure is under the old practice. The old practice was a practice standing upon the older Rules of 1853; and for the purpose of such actions

(1) Under 30 & 31 Vict. c. 142, s. 10.

(2) 19 & 20 Vict. c. 108, s. 26.

and applications in such cases, that system of procedure remains in force. It is preserved by the Judicature Act, and by the Rules made under the Judicature Act; and the procedure in these cases must be according to that old procedure, and those old Rules.

Now, that would make all these cases out of time, because the applications must all have been made within four days; and it is obvious, when one's attention is drawn to it, that it is a mode of procedure exceedingly inconvenient even with the greater ease of communication which exists compared with what existed in the year 1853; and, if it were strictly followed, it would make the time for applications in such cases as these from all parts of England four days. Strictly speaking, therefore, as far as I understand, and as far as we are told by the learned counsel, every one of the cases which stood over would be out of time. But this is procedure, and stands upon rule resting upon the authority of the courts to which this Court has succeeded. It ought to be the law, and there is sufficient authority to shew that it has been the practice, not to make that procedure absolutely inflexible. In several cases, one or two of which were brought to the attention of the Court in the course of the argument, the time limited by the Rules of 1853 has been extended by the courts, where gross injustice would follow from their not so extending the time. Amongst those cases, there is authority for saying that the rigour of the Rule may be relaxed where there has been an honest mistake on the part either of the suitor or of the counsel; as in the case where a motion was made bonâ fide in the old Court of Exchequer, whereas it ought to have been made in the old Court of Common Pleas, and consequently the motion which ought to have been made in the last mentioned Court was not made within the proper time, the Court of Common Pleas, nevertheless, thought itself justified, and I think rightly so thought, in correcting so mere a mistake, and not allowing its own Rule to be the means of defeating justice in the particular case. (1)

In these cases, therefore, we have come to the conclusion that, inasmuch as there was a reasonable excuse for the mistake which has been made in all of them,—and, indeed as this Court itself has in some degree led to the mistake that was made,—the Court will enlarge the time, and allow the motions standing over to be made and the cases to be heard notwithstanding the time for moving had strictly lapsed. But it must be understood now, after this full discussion—after the decision of the Court of Appeal (1), after the careful examination which we have given to these Rules, and coming finally to the conclusion that the practice is according to the old system, although that practice may be inconvenient, and may be altered (and, speaking for myself, I will endeavour that it shall be altered), we really must hear no more about mistakes, and from this time it must be understood that the rule is as I have stated, and if that rule is not adhered to cases will not be heard.

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(1) *Johnson* v. *Warwick*, 17 C. B. 516.

Mathew, J. I am of the same opinion. I agree with my Lord that Order XXXIX., which was principally relied upon by the learned counsel, is not applicable to the case. It was suggested further, that, if Order XXXIX. was not applicable to the case, Order LII. became applicable. When we come to examine the provisions of Order LII., it appears to me to be clear that that Order was intended to be in pari materiâ with Order XXXIX. Further, in the first of the rules under Order LII., the provision is, "Where by these Rules any application is authorized to be made to the court or a judge, such application, if made to a divisional court, or to a judge in court, shall be made by motion." That provision is perfectly plain. The Rules were not intended to apply to such a case as this, inasmuch as the application in question was not intended to be made by these Rules.

That being so, the question is what procedure is to be adopted here, the action being one in which the issues have been remitted to the county court to be tried. It appears to me that the only provision applicable is that contained in Order LXXII., "Where no other provision is made by the Acts or these Rules, the present procedure and practice remain in force." I cannot help thinking that by an oversight those who have to complain of misdirection on the part of the learned county court judge ought in such a case as this to have recourse to the Rule of 1853, which required that an application, no matter where the case has been tried, shall be made to the court in banc upon proper materials within four days. I quite agree with my Lord that anything more inconvenient cannot very well be imagined than that burthen so imposed on suitors in the county court: and I trust his prediction that things will be mended will be speedily realized.

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(1) In *Mathews* v. *Ovey*, 13 Q. B. D. 403.

Now, we are driven back to the procedure Rules of 1853. What is their character? They are rules which have no statutory authority. Their true character is described in the case of *Rowberry* v. *Morgan* (1), as being merely declaratory of the practice of the Court. They are regulations laid down with the intention of forwarding justice and securing the administration of the law between party and party; and they are, like all other rules of procedure laid down by the Court for its own guidance, subject to the control and subject to the discretion of the Court. The Reports are full of cases in which applications have been made to the Courts under the Rules of 1853 to permit the motion for a new trial to be made after the four days. The Courts have properly maintained that rule in its strictness, unless good cause could be shewn for departing from it: and, where the applicant has been in fault, where his neglect has in any way accounted for the delay, the Courts have almost invariably refused to interfere; but it is quite noticeable that in many of those cases the Court justly points out the right inherent in it in a proper case, where injustice would otherwise be done, to relax the stringency of the rule in question. Among the many cases in which it has been done, it is only necessary to refer to a few,—one as far back as the 5th Term Reports,—because the rule in question is a very old procedure embodied in the Rules of 1853, as it had been embodied in the Rules of Wm. 4. (2) In *Rex* v. *Holt* (3), the Court describes the character of all such rules, and lays down the principle. Again, in the case of *Newton* v. *Boodle* (4), the same principle was acted upon. That was the case where, after a bill of exceptions had been tendered, the judge before whom the case was tried died; and in that case the party who tendered the bill of exceptions was permitted to move for a new trial long after the expiration of the four days. Then there are the two cases to

(1) 9 Exch. 730.

(2) 2 Wm. 4, c. 65.

(3) 5 T. R. 436.

(4) 3 C. B. 795.

which my Lord has referred: and many others might be cited. In the case in which the mistake was made by counsel, the rule was departed from.

In this particular case it is obvious that the party has been misled by the refusal of the Court to grant rules in many cases: the Court, after the decision that the rules under the Judicature Act applied, would not allow its officer to draw any rule for the purpose of permitting an appeal to be made, in accordance with the Rules of 1853. Therefore those who have failed to bring their motions before the Court are entirely without blame; and it is our duty, in furtherance of justice, and as it seems to me, in accordance with the established practice of the Court, to correct the mistake which has been made, and to permit the case to be argued.

SMITH, J. The great question in this case is, whether the new rules apply to a case tried in the county court. Now, it has been authoritatively settled that, if this action had been initiated in the county court, the new rules do not apply. It has also, I think, been settled that, where the defendant gets a cause sent down upon an affidavit that the plaintiff has no visible means to pay costs, that also goes into the county court and is a county court case proper; and therefore upon those two classes of cases the cases of *Swansea Co-operative Building Society* v. *Davies* (1) and *Mathews* v. *Ovey* (2) are precise authorities for shewing that these new rules will not apply to either of them. But it was said that, inasmuch as this was only a remitted case, that is, a case sent down for trial to the county court, and after trial had to come back again to the High Court, these rules apply.

It seems to me, however, to be quite clear, after reading those two authorities, that Order XXXIX. does not apply to a trial in the county court at all. I need not go through the different rules, as it has been fully pointed out in *Swansea Co-operative Building Society* v. *Davies* (1) that they are wholly inapplicable to a trial before a county court judge or a county court judge and a jury.

But it is said that Order LII. applies, because that order says that, "where by these rules any application is authorized to be made to the Court or a judge, such application, if made to a Divisional Court or to a judge in Court, shall be made by motion;" and then Rule 3 goes on and says there shall be no rule nisi but everything shall be by motion. It seems to me, however, that, when you look at that rule, the first line of it shews that it is only applicable to causes tried and determined in the High Court of Justice, and not in any shape or way to trials in the county court. The very first line says, "Where by these rules any application is authorized to be made." Where is there any application authorized to be made by these rules in the case of a trial in the county court? It seems to me that there is none, and that by the purview of these rules all the proceedings in the county court are left untouched from first to last.

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(1) 12 Q. B. D. 21.

(2) 13 Q. B. D. 403.

I agree with the observations which have fallen from my Lord and my Brother Mathew; and I quite concur in the course they have suggested.

Order accordingly.

Solicitors for plaintiff: *Chester & Co.*

Solicitor for defendant: *Parry.*

J. S.

Nov. 29.

[CROWN CASE RESERVED.]

THE QUEEN *v.* WELLARD.

Criminal Law—Indecent Exposure of Person—Public Place—Nuisance—Public Nuisance—Exposure—14 & 15 *Vict.* c. 100, s. 29.

The prisoner was convicted of indecently exposing his person to divers subjects of the Queen in a certain public place, upon evidence shewing that the place in question was out of sight of the public footpath, but was a place to which the prisoner had gone with several little girls, though without any legal right to go there, and was a place to which persons were in the habit of going without having any strict legal right so to do, and that persons so going were never in any way hindered or interfered with:—

Held, by the Court (Lord Coleridge, C.J., Grove, J., Huddleston, B., Manisty and Mathew, JJ.), that the conviction was correct, and that the jury were justified in finding that the place was public.

Semble, that the offence may be indictable if committed before divers subjects of the realm, even if the place be not public.

THE following case was stated.

"At the court of general quarter sessions of the peace holden

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in and for the county of Kent, at Maidstone, on the 3rd of July, 1884, Frederick Wellard was indicted, tried, and convicted of the misdemeanor of indecently exposing his person to divers liege subjects of the Queen in a certain open and public place, to wit, a marsh in the parish of Northfleet. The evidence shewed that the prisoner, Frederick Wellard, in the middle of the day on the 28th of May last, called some seven or eight girls of the ages of eleven and eight, and thereabouts, who were at play near Northfleet Church, and told them that if they would go down into the marsh with him he would give them a halfpenny. On this, the girls all went down into Northfleet marsh with him, following him. They first went along a public footpath for some distance, and then came to a row of willow trees growing at a certain angle with the path, there the prisoner and the girls turned off the footpath on to the marsh where there was no path. There was another row of trees a little distance off, the prisoner and the girls went in on the grass land between the two rows of trees till they came to a fallen tree about one hundred and seventy paces from the footpath and out of sight of it. At the fallen tree the prisoner lay down on the ground, and there intentionally exposed his person indecently to all the seven or eight little girls together, who were close to him, and he invited them to touch his person, and used disgusting language. No one but the girls saw this exposure nor could any one have seen it from the footpath. As the girls were on the footpath on their way to the fallen tree, they saw some boys bathing in the water two or three hundred yards off on the other side of the marsh. These boys saw the girls while the girls were on the footpath, but lost sight of them for a short time when they turned off. The boys dressed quickly, and came up as soon as they could after the girls to the fallen tree; there they found prisoner lying down after his exposure of his person to the girls. The girls were there also. These boys saw nothing improper, as the prisoner had turned round on their approach, and was lying on his stomach. When the prisoner and the girls turned off from the footpath towards the fallen tree they were, legally speaking, trespassing. But all persons who desired to do so were in the habit of going on to the marsh, and no one interfered with them or hindered them, or made objection."

The question for the Court was, whether on these facts the jury were justified in finding that the prisoner exposed himself indecently in a public place.

F. J. Smith, for the prisoner. This was not a public place, the spot was so placed that nothing of the indecency could be seen from the public footpath. The marsh was not public; the public had no right there. A place is not public where the public have no right to be.

[LORD COLERIDGE, C.J. What do you say is a public place?]

Private property where the public can only get by trespassing is not public. The authorities, it is contended, shew that the publicity of the place is necessary to be proved in these cases; here at any rate it is so alleged, and the charge must be proved as laid.

[He referred to the following cases: *Reg.* v. *Thallman* (1); *Reg.* v. *Holmes* (2); *Reg.* v. *Watson* (3); *Reg.* v. *Elliott* (4); *Langrish* v. *Archer* (5); *Turnbull* v. *Appleton.* (6)]

No counsel appeared in support of the conviction.

LORD COLERIDGE, C.J. This indictment is framed upon the common law as well as upon the statute.

The offence against decency was committed in the presence of a number of little girls, and the question for us is whether the jury were justified by the evidence in finding that the indecent exposure was in a public place as alleged in the indictment. It took place on a grassy spot where it was not seen from the foot-road, but it was at a place where people in fact went when they liked, where people did in point of fact go without hindrance. It is true they had no legal right to go, and the question arises was this indecent act done in a public place. Mr. Smith failed to give us any very clear affirmative definition of what was a public place. He was inclined to say that if any number of persons were assembled at a place without legal right, and a person acted before them with indecency of the kind in question, that was not punishable. I am of opinion that we should not hold that it is sufficient to prove that, as a matter of law, the place was one to which there was no strict legal right of access in order to make out a defence where the act is in fact committed in the presence of a number of the public, in the presence of a number, that is, of persons. It is, I concede, difficult to define affirmatively what is a public place; this place, however, is clearly so. The public did undoubtedly have access to it. I am by no means sure that at common law the publicity of the place itself is an essential element in the offence, and I am not inclined now to say so: it is not necessary to decide this question. It is, however, obvious that what is a public place may vary from time to time, and what we now have to consider is, was this place at the time public? a place where the public undoubtedly were. In the case of *Rex* v. *Crunden* (1), where the accused had bathed on the beach at Brighton in the daytime at a place then overlooked by houses, but which till within a few years of that time had been a secluded spot with no houses near, McDonald, C.B., says, "The law will not tolerate such an exhibition. Nor is it any justification that bathing at this spot might a few years ago be innocent;" and then he goes on to say, "Whatever place becomes the habitation of civilized men, there the laws of decency must be enforced."

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(1) L. & C. 326; 33 L. J. M. C. 58.

(2) 1 Dears. C. C. 207; 22 L. J. M. C. 122.

(3) 2 Cox, C. C. 376.

(4) L. & C. 103.

(5) 10 Q. B. D. 44.

(6) 45 J. P. 469.

Here the public were in the habit of resorting to this place, and no one prevented them from so resorting to it, and the prisoner goes there with a number of little girls, and there does that which is alleged against him. It is clear that there was ample to justify the verdict, and the question of whether it is necessary as matter of law to allege and prove the place in all such cases to be public, may be considered when necessary; at present it is, as I say, not necessary to consider it.

GROVE, J. The contention for the prisoner must be that a public place must be a place where the public have an absolute legal right to go. The case of *Turnbull* v. *Appleton* (2) is not so very unlike the present, but it does not decide the point, it was a case under a statute and of a nature different from this. A

(1) 2 Camp. 89, 90.

(2) 45 J. P. 469.

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public place is one where the public go, no matter whether they have a right to go or not. The right is not the question. Many shows are exhibited to the public on private property, yet they are frequented by the public—the public go there. To my mind, the case is clearly one in which we should uphold the conviction.

HUDDLESTON, B. The beach at Brighton is not public property, yet an exposure there is punishable. It seems to be established that, speaking generally, whatever openly outrages decency and is injurious to public morals is a misdemeanour at common law. (1) The act was in a public and open place, and that disposes of the case, but I am by no means satisfied that indecency before several in a private place is not punishable. However, here it is pleaded that it was in a public place. The prisoner himself took with him to this place several children, and in their presence outraged public decency. The facts fully warrant the conviction.

MANISTY, J. It must not be taken that I hold it necessary, in order to convict of the common law misdemeanour for indecency towards divers subjects of the realm, to prove that the indecency occurred in a public place. Here, however, it was alleged to have been, and it was, in a public place.

MATHEW, J. I concur. I think it may be a crime at common law without being in a public place as alleged in the present case. There was in this case abundant evidence that the place was, as charged, public.

Conviction affirmed.

Solicitors for prisoner: *Dolman & Pritchard, for Hayward & Smith, Rochester.*

(1) 4 Bl. Com. 65; 1 Hawk. P. C. c. 5, s. 4; 1 East, P. C. c. 1, s. 1; note to *Rex* v. *Crunden*, 2 Camp. 90.

C. D.

1884
Dec. 15

MILLWARD *v.* THE MIDLAND RAILWAY COMPANY.

Master and Servant—Employers' Liability Act, 1880 (43 *&* 44 *Vict. c.* 42), *s.* 1, *sub-s.* 3—*Injury resulting to Workman from having conformed to Orders or Directions of Fellow Workman.*

The 1st section of the Employers' Liability Act, 1880, provides that, where personal injury is caused to a workman (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed, the workman or, in case the injury results in death, his legal personal representatives, shall have the same right of compensation against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work.

The plaintiff, a boy employed by the defendants, a railway company, was assisting a carman of the defendants, under whose directions he was, in unloading from a van three large iron window frames. The frames were standing upright in the van, secured at each end to the hoops of the van by a string. The carman untied the string at one end of the frames, and the plaintiff untied the string at the other end. The carman did not expressly order the plaintiff to untie the string, but the plaintiff stated that he did so without orders because he had done so on previous occasions and that the carman saw him untie the string and made no objection. The carman then removed one of the frames without retying the two remaining frames, leaving them standing unsecured. They directly afterwards fell on the plaintiff, causing him injuries in respect of which he sued the defendants for compensation under the Employers' Liability Act, 1880:—

Held, that there was on the above facts evidence of an injury to the plaintiff by reason of the negligence of a fellow workman to whose orders he was bound to conform, and did conform, and which resulted from his having so conformed.

Appeal from the County Court of Derby.

The facts, as appearing from the case stated on appeal, were as follows:—The plaintiff, an infant, by his next friend, sued the defendants, a railway company, under the Employers' Liability Act, for damages for personal injuries caused to him while in the performance of his duties in their employ, by the negligence of a carman named Hicks, their servant. Upon the trial before the county court judge and a jury the following evidence was given by the plaintiff. The plaintiff stated that he was fourteen years old, and was employed by the defendants as a van guard. His duties were to keep watch over the goods in his van, to attend to the horse, and when not so engaged to assist in unloading. On the day when the accident occurred by which he was injured he was acting as guard of a van driven by Hicks, a carman in the defendants' employ, at one of the defendants' stations. The van was backed to the platform of the goods station in order that three large iron window frames might be unloaded from it and put on the platform. These frames, which were about 7 feet long by 5 feet broad, had been placed upright inside the van, and were secured in that position by two pieces of tarred string, one piece being tied at each end round the hoops supporting the covering of the van. Hicks stepped into the van and began to unload. He untied the string near the tail end of the van, and the plaintiff, who was inside at the front of the van, untied the other string. He was not asked by Hicks to do so. Hicks began to pull one of the frames away without retying the other two, leaving them standing. Directly afterwards the two frames fell upon the plaintiff, severely injuring his head and rendering him insensible. The plaintiff stated that he untied the string at one end without any orders from Hicks, because he, the plaintiff, had done so on other occasions, and that Hicks saw him untie it, and made no objection.

At the conclusion of the plaintiff's case the county court judge ruled that there was not any evidence to support plaintiff's case under any of the sub-sections of the 1st section of the Employers' Liability Act, 1880, except sub-s. 3.

It was contended for the defendants that there was no evidence that Hicks was a person to whose orders or directions the plaintiff was bound to conform, or that the plaintiff met his injuries from having conformed to any order or direction from Hicks, that the plaintiff was a volunteer, and that the plaintiff's own contributory negligence was the cause of the accident, and that on the whole case there was nothing to be left to the jury.

The county court judge ruled that there was a case for the jury under sub-s. 3. Thereupon evidence was called for the defence, which it is unnecessary to set out in detail, as the verdict of the jury negatived the truth of it. The general effect of it was to contradict the evidence of the plaintiff as to the way in which the accident took place, the defendants' witnesses alleging that Hicks, the carman, did tie up the two remaining frames before removing the first, and that the plaintiff himself untied them.

Hicks stated in answer to the judge that the plaintiff was under him, and if he told him to do anything he expected him to do it. The jury found for the plaintiff, damages 30*l.*

The questions for the Court were—1. Whether there was evidence under sub-s. 3 of the 1st section of the Employers' Liability Act of the plaintiff having been injured by reason of the negligence of a person in the service of the defendants to whose orders he was bound to conform and did conform, and that he was injured by his having so conformed. 2. Whether there was evidence on the plaintiff's case that in what he did he had acted as a volunteer. 3. Whether there was on the plaintiff's case such evidence of contributory negligence that the judge ought to have nonsuited.

Smyly, for the defendants. The common law doctrine with regard to injuries occasioned by the negligence of a fellow servant engaged in a common employment is only altered by the Employers' Liability Act, 1880, in certain specified cases. In order that there may be a case under the 3rd sub-section of the 1st section of the Employers' Liability Act, 1880, there must be an order given to which the person injured was bound to conform and did conform, and the injury must be the result of the conforming to the order. It is submitted that there was no order within the meaning of the sub-section in this case. The plaintiff was not ordered to untie the frames. It may be that he was bound to obey Hicks' orders if he gave any, but if Hicks gave no order it was merely the case of two workmen engaged in a common employment, to which the 3rd sub-section does not apply.

[DAY, J. Surely the order need not be by express words. The jury might think that an order was implied from the circumstances.]

It is contended that there must be something amounting to a direction to do a specific act, the result of which is the injury.

[MATHEW, J. The plaintiff was doing what, according to his evidence, it was the ordinary course of business for him to do in unloading similar goods. Is it necessary in order that the subsection may apply that an order should be verbally given to a man to do what it is the ordinary course of his duty to do every day in the week?]

It is clear from the other sub-sections that it was not meant that in every case where two workmen are engaged in a common employment the employer should be liable for injuries occasioned to one by the negligence of the other. If this case is held to be within the 3rd sub-section, the effect will be to do away with the doctrine of common employment almost entirely, because when two workmen are working together one may generally be said to be working under the orders or directions of the other. The case intended by the sub-section is the case where the person injured does an act from which the injury results in consequence of the fellow servant's order. It is not enough that he is acting generally under the fellow servant's orders or directions. If general directions are held to be sufficient Hicks is put in the position of a superintendent under sub-s. 2, whereas by the interpretation clause (s. 8) a superintendent is a person not ordinarily engaged in manual labour, as Hicks appears to have been.

The injury must result from the conforming with the order. Here the injury cannot be said to have resulted from the conforming with the order. The supposed order was to untie the string. But there was no negligence in giving that order, and the injury did not result from that order, for the string must in the ordinary course of business have been untied. The injury resulted from the negligence of the carman in a subsequent matter, viz., in not securing the remaining frames before removing the first frame. The order has no connection with the subsequent negligence. The plaintiff did not assist in the subsequent removal of the frame. There is nothing to shew that the plaintiff could not have performed the duty of untying the string without exposing himself to the risk of the fall of the other frames. If they were not secured the risk was as obvious to him as to Hicks, and he should have secured them himself or stood where they could not fall on him. It was not proved that obedience to the supposed order necessarily involved his being exposed to the risk of the injury that happened. The carman did not order him to stand where the unsecured frames would fall upon him after he had untied them.

J. H. Etherington Smith, for the plaintiff, was not called upon.

MATHEW, J. I am of opinion that our judgment should be for the plaintiff. The defendants' counsel has suggested various difficulties with regard to the construction of the Employers' Liability Act, but I do not see any difficulty so far as the present case is concerned. It appears to me that there was ample evidence to support the verdict under the 3rd sub-section. The operation upon which Hicks and the plaintiff were engaged was that of unloading three frames from a van, and there was evidence, as it seems to me, that the mode in which it ought to have been performed was by untying the three frames, then tying two of them up again, and removing the third. What happened was that when the three frames were untied the carman, without waiting to see the two remaining frames secured again, began to remove the first. I think that on these facts there was evidence of negligence on his part.

The next question is, whether Hicks was a person to whose orders or directions the plaintiff was bound to conform and was conforming at the time of the injury. It seems to me that there was sufficient evidence of that also.

The remaining question is, whether the injury resulted from the plaintiff's having so conformed to Hicks' orders. I think that there was evidence that the injury resulted by reason of the plaintiff's conforming to the order given to him by Hicks to assist in the operation that was being performed and in the performance of which Hicks was guilty of negligence. The defendants' counsel has suggested that the injury did not necessarily result from the carman's negligence, that the plaintiff might have so placed himself as to avoid risk if the frames fell, and that the plaintiff therefore was guilty of contributory negligence. The answer seems to me to be that the defendants did not fight the case before the jury on any such ground. The case submitted to the jury for the defendants was that the evidence for the plaintiff was untrue, for they called witnesses to shew that the carman had done what he ought to have done, and that the two remaining frames were retied, the suggestion being that the plaintiff himself had untied them afterwards.

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The jury discarded these statements. It seems to me that these statements being discarded, the evidence for the defendants really aids the plaintiff's case. On these grounds I think that there was evidence for the jury under the 3rd sub-section, and therefore that the appeal must be dismissed.

DAY, J., concurred.

Appeal dismissed. Leave to appeal refused.

Solicitor for plaintiff: *G. P. Rogers.*

Solicitors for defendant: *Beale, Marigold, & Co.*

E. L.

Dec. 15.

LINE AND OTHERS, PETITIONERS; WARREN, CHECKLEY AND BROMWICH, RESPONDENTS.

Municipal Election—Election of Town Councillors—Petition against some only of the Candidates returned on a Ground affecting the Validity of the Election as a whole—Municipal Corporations Act, 1882 (45 *&* 46 *Vict. c.* 50), ss. 87, 88, 91, 93, *Sched.* 3, *Part II., rules* 3 *and* 10.

An election petition may be presented under the Municipal Corporations Act, 1882, s. 87, against some only of the persons returned at a municipal election, although the ground of the petition is one affecting the validity of the election as a whole; and the Court can on such petition declare the persons so petitioned against not to have been duly elected.

CASE stated under s. 93, sub-s. 7, of the Municipal Corporations Act, 1882, upon a petition questioning the election of the respondents as councillors for the borough of Daventry.

The facts in substance appeared to be as follows:—The borough of Daventry is not divided into wards. An election of four councillors to fill four vacancies in the town council of the borough was held on the 1st of November, 1883. Previously to the said election the town clerk issued a notice of the election stating, among other things, that each candidate must be nominated by a separate nomination paper, but that the same burgesses, or any of them, might subscribe as many nomination papers as there were vacancies to be filled but no more.

The three respondents and six others, viz., Edward Brooks, William White, Thomas Harris, John Merrifield, Charles Rodhouse, and John Edward Rodhouse were nominated as candidates at such election. When the mayor attended at the town hall to decide on the validity of the objections to the nomination papers under the Municipal Corporations Act, 1882, sched. 3, part II., rule 9, objection was taken by Brooks, one of the candidates, to the nomination papers in the case of Harris, Merrifield, and the Rodhouse, on the ground that they were invalid under the 10th rule of Part II. of the 3rd schedule of the Municipal Corporations Act, 1882, because the persons subscribing the paper in each case had subscribed other nomination papers of candidates at the election.

No burgess, however, subscribing the nomination papers had subscribed more nomination papers than there were vacancies to be filled, nor more than one nomination paper for any one candidate.

Brooks ultimately withdrew his objection to the nomination of Harris. The mayor then allowed the objection to the nomination papers of the other three candidates objected to, who were consequently prevented from standing at the election. The result of the election was that out of the six remaining candidates Harris and the three respondents were the first four on the poll and were declared elected. The petitioners then presented a petition against the election of the three respondents under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 87, praying that it might be declared that the said respondents were not duly elected, and that their election and return was wholly null and void. The questions raised for the opinion of the Court, were (1) Whether the election of the respondents could be questioned by petition in the absence of the said Thomas Harris, who was elected at the said election, and who was not made a party to the proceedings. (2) Whether, under the circumstances, the respondents were duly elected or returned.

Yarborough Anderson (*Montague Spearman* with him), for the petitioners. The respondents were not duly elected. The mayor's decision as to the validity of the objection to the nomination papers was erroneous, as rule 10 of the Municipal Corporations Act, 1882, Schedule 3, part II., does not apply to the case of several nominations by the same burgess for several vacancies. Rule 3 of Schedule 3, part II., provides that the same burgesses or any of them may subscribe as many nomination papers as there are vacancies to be filled and no more. Rule 10 provides that "where a person subscribes more nomination papers than one, his subscription shall be inoperative in all but the one which is first delivered." Clearly that rule cannot apply to nominations in conformity with rule 3.

The Municipal Corporations Act, 1882, enables petitioners to petition against the return of a particular person or persons on the ground that he or they were not duly elected by a majority of lawful votes without seeking to avoid the whole election, and does not compel them to include in the petition a person of whose election they do not complain. See s. 87, sub-ss. (*c*) (*d*); s. 88, sub-s. 2; s. 91, sub-s. 3; *Line* v. *Warren.* (1) Why should the three respondents, who clearly were not duly elected, retain their seats because another person who also was not duly elected is not petitioned against, and therefore cannot now be unseated?

Coward, for the respondents. The petition is bad on the face of it, for the Court cannot declare the election void as to three only out of four persons returned, leaving it to stand good as to the fourth, upon an objection which goes to the validity of the whole election. If the mayor's decision on the validity of the nomination papers was wrong, the whole election was necessarily void, because, if the rejected candidates had stood, it may be that neither Harris nor any of the respondents would have been returned. By s. 93, sub-s. 4, the Court is to determine whether the person whose election is complained of or any and what other person is duly elected, or whether the election (that is the election as a whole) was void. The Court has no power to declare the election partially void; its only power in such a case, viz., when the election is invalid as a whole, is to declare the election altogether void, which cannot be done on a petition to which Harris is not made a respondent.

[DAY, J. Under the old procedure by quo warranto the Court could have declared the election void as to the particular persons whose election was challenged.]

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(1) 51 L. T. (N.S.) 359.

He cited *Howes* v. *Turner* (1); *Budge* v. *Andrews*. (2)

Yarborough Anderson, was not called on to reply.

MATHEW, J. I am of opinion that our judgment must be for the petitioners. An objection was taken to the nomination paper in the case of three of the candidates at the election in question founded upon the 10th rule of the 2nd part of the 3rd schedule to the Municipal Corporations Act, 1882. The mayor allowed the objection, but I think that his decision was erroneous. The 3rd rule of the schedule provides that the same burgesses, or any of them, may subscribe as many nomination papers as there are vacancies to be filled, and no more. The 10th rule clearly does not apply to the present case, where there were several vacancies, and no burgess had signed more than one nomination paper for any one candidate, or more nomination papers than there were vacancies. In consequence of the disallowance of these nominations the petition was filed and this case is stated. The first question raised is whether the election of the respondents can be questioned by petition in the absence of Thomas Harris, who was elected at the said election, and who has not been made a party to these proceedings. The second question is whether the respondents were duly elected. The counsel for the respondents practically abandoned his contention on the second question, and admitted that he could not assert that the respondents were duly elected. But he contends that upon the first question the respondents are entitled to succeed. The argument is that, inasmuch as the same objection might have been made to Harris's election, the Court cannot do anything in the absence of Harris, because it cannot in such a case declare the election void as to three of the persons elected without doing so as to the fourth also. I cannot see any foundation whatever for that contention. It seems to me that the scope of the legislation on the subject is to enable the election of particular persons to be challenged by petition. It is the duty of the Court to pronounce on the prayer of such petition, but it can only deal with the case of the persons whose election is objected to. Harris's election was not objected to by the petition, and it is clear that he must now be treated as duly elected, because there has been no petition presented against him within the time limited for that purpose.

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(1) 1 C. P. D. 670.

(2) 3 C. P. D. 510.

The sole duty of the Court, therefore, is to see whether the objection taken with regard to the respondents is made good. Assuming that Harris was not duly elected, the Court has nothing to do with his election, and has no power to go outside the petition, to which he is not a party. The case of *Howes* v. *Turner* (1) was referred to as supporting the respondents' contention, and as shewing that in such a case as the present the Court must declare the whole election void; but the case decides no such thing. There all parties concerned were before the Court, the petitioners being the unsuccessful candidates, who claimed to have been duly elected, and both the parties returned being made respondents. The argument urged on the Court was that they were bound to declare the petitioners duly elected, and had no power to declare the election void; but the Court held otherwise, and that under the circumstances they ought to declare the whole election void. That case has no bearing whatever on the present case. The case of *Budge* v. *Andrews* (2) was also cited, but the decision in that case is equally remote from the present question.

DAY, J., concurred.

Judgment for petitioners.

Solicitors for petitioners: *Caister & Shearman.*
Solicitors for respondents: *Kingsford, Dorman, & Co.*

(1) 1 C. P. D. 670. (2) 3 C. P. D. 510.

E. L.

1884
Nov. 25.

AGNEW AND OTHERS *v.* USHER AND OTHERS.

Practice—Service of Writ out of Jurisdiction—Action for Rent of Land in England—Defendants domiciled or ordinarily resident in Scotland—Judicature Acts, 1883, *Order XI., rule* 1 (*b*), (*e*).

Order XI., rule 1, does not enable the Court or a judge to allow service out of the jurisdiction of a writ in an action for non-payment of rent due under a lease of land in England against defendants who are domiciled or ordinarily resident in Scotland.

MOTION to set aside an order for service on the defendants, resident in Scotland, of a writ issued by the plaintiffs, residing at Liverpool, in an action for 170*l.*, one quarter's rent of premises at Liverpool, held under a lease for ten years.

It was alleged by the plaintiffs, that the lease had been assigned to the defendants, who, as assignees, were liable to pay rent. The defendants alleged that the assignment was to secure a debt, but that they never signed nor accepted the assignment, nor entered into possession.

French, for the defendants, in support of the motion. By Order XI., rule 1, service out of the jurisdiction may be allowed whenever (inter alia) (*e*) "The action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland." The defendants being domiciled or ordinarily resident in Scotland are within the exception, and as no other clause of rule 1 applies, they cannot be served: *Lenders* v. *Anderson.* (1)

The Court called on

Barnes, for the plaintiffs, to shew cause. First, Rule 1 (*a*) has reference to cases where the "subject-matter of the action is land," and (*b*) deals with the rights "affecting land," and allows service out of the jurisdiction whenever "any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action." An obligation to pay rent is a contract, obligation, or liability affecting land, and an action for rent is to enforce such contract, obligation, or liability. The policy of the rules was to deal with actions in respect of land differently from the mode in which other actions are treated. This appears from the arrangement and language of the subsections. Rule 2 shews that the whole of rule 1, except where Scotland is expressly excluded, applies to persons resident there: see per Grove, J., in *Lenders* v. *Anderson.* (1) A writ in ejectment might certainly be served on a defendant there.

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(1) 12 Q. B. D. 50.

Secondly, subs. (*e*) does not apply, for otherwise the provisions of (*b*) would be modified as to Scotland. Subs. (*e*) must be construed with reference to the other provisions of the rule. If a Scotchman deals with land in England it is not unfair that he should be brought to these tribunals.

LORD COLERIDGE, C.J. I do not give judgment in this case with unhesitating confidence, because it appears to me possible that the same contract may be within clause (*b*) or within clause (*e*) of Order XI., rule 1. This contract is, I think, clearly within (*e*), but I admit that that is not conclusive, because the contract might be within (*e*) and might also be within (*b*), and there might be much difficulty in construing the rules for general convenience so as to avoid conflict. But I think (*b*) would have to be stretched to include the present contract, whereas it comes within (*e*) without in any way stretching that clause.

Order XI., rule 1, deals with service out of the jurisdiction, and from the 1st subsection (*a*) it is clear that whenever the subject-matter of the action is English land the trial—not "shall" but—may be allowed in England, for otherwise, if an action relating to the status of English land were brought in Scotland, the judgment of the Scotch Court could only be enforced in a very circuitous way. That is a good reason why, as a general rule, actions of ejectment and of the like kind, when the land of which the property, or possession, or status is disputed is English land, should be brought in England.

(1) 12 Q. B. D. at p. 56.

Then follows subs. (*b*), and I think the more reasonable construction of (*b*) is to limit it to any legal proceedings—to use the largest and most vague term—in which English land is, according to the words of the subsection, to be affected. There, as the thing to be affected is in English jurisdiction and is not in Scotch jurisdiction, recourse should be had to the English forum. I do not intend to give a complete or exhaustive account of all possible proceedings "affecting land" which are probably within clause (*b*), but according to the ordinary rules of construction and legal phraseology, an action to obtain payment of rent certainly is not an action to enforce "any act, deed, or will," and I do not think it is to enforce any "contract, obligation, or liability *affecting* land within the jurisdiction."

But in (*e*) there are words which exactly describe the contract sought to be enforced here. It is said that the defendants are tenants, and that they have not paid their rent according to their contract to pay it, and it seems to me therefore that the action is founded on a breach of contract made within the jurisdiction, to be performed within the jurisdiction, but as to which (*e*) says that if the defendant is "domiciled or ordinarily resident in Scotland or Ireland," service on him out of the jurisdiction may not be allowed: rule 1. Suppose, instead of this being an action against a tenant it were an action against a man who in some instrument had guaranteed the rent, and the rent had not been paid. I fail to see why that, according to the argument for the plaintiffs, is not just as much on a contract or obligation affecting land, as an action against the tenant originally liable. It would be stretching the words of rule 1 very much to bring within (*b*) an action against such guarantor, yet in substance the actions are exactly the same. They are to recover the same sum of money, and to recover against A., who has undertaken to pay if B. does not. If so, this is an action clearly within (*e*), and clearly within the mischief intended to be prevented by the proviso in (*e*), viz., a Scotchman, domiciled or ordinarily resident in Scotland, being made liable personally on an English contract. In such case, according to the ordinary rule of law, the plaintiff must seek the forum of the defendant. That is the rule followed in rule 1 (*e*). Without saying that this case is clear, I am of opinion that service out of the jurisdiction should not be allowed, and the order for service should be set aside.

MATHEW, J. I am of the same opinion, and for the same reasons.

A. L. SMITH, J. I am of the same opinion. I had much difficulty in coming to a conclusion, but I entirely agree with my Lord. I will only add a few words as to subs. (*b*). The Lord Chief Justice says that the words "any act, deed, will, contract, obligation, or liability," need not comprise the present case. I do not disagree with that observation, but I would rather found my judgment on this, viz., that the deed, . . . contract, obligation, or liability affecting land is clearly not one which is "sought to be enforced in the action." As I read those words "sought to be enforced in the action," they seem to mean "specifically performed." To bring the case within (*b*), the instrument or obligation "affecting land," must be "sought to be construed, rectified, set aside or enforced in the action." But the plaintiff is not seeking so to do in this action. I think the case is not within (*b*), and is clearly within subs. (*e*) rule 1.

Motion refused.

Solicitors for plaintiffs: *Field, Roscoe, & Co.*
Solicitors for defendants: *W. W. Wynne & Son.*

J. R.

1884
Oct. 24.

Ex parte HASKER.

Practice—Costs—Order as to Supreme Court Fees, 1884, *Schedule* 52—*Fee for "entering cause or matter for trial or hearing"—Rule ordering Justice to hear Application for Summons.*

Under the Order as to Supreme Court Fees, 1884, Schedule 52—which directs that a fee of 2*l.* shall be paid "on entering or setting down, or re-entering or re-setting down an appeal to the Court of Appeal, or a cause or matter for trial or hearing in any court in London or Middlesex, or at any assizes"—such fee is payable though the matter for hearing does not arise in an action, as in the case of a rule nisi against a justice under 11 & 12 Vict. c. 44, s. 5.

Application for a rule ordering a metropolitan police magistrate to hear an application for a summons for libel. A rule nisi was granted, but when it was proposed to enter it in the Crown Office a fee of 2*l.* was demanded under the Order as to Supreme Court Fees, 1884, Schedule. (1)

The applicant objected to pay the fee, and went before Chitty, J., at chambers, who supported the decision of the Crown Office.

The applicant, in person, moved on appeal from this decision, and contended that upon the true construction of the Order no fee was payable where the matter for hearing did not arise in an action.

The Court (Grove, J., and Stephen, J.) held that the words "cause or matter for trial or hearing in any court in London or Middlesex" were not confined to cases where the matter for hearing arose in an action, but extended to any matter entered for hearing; that they must be taken to apply to a rule nisi, like that in the present instance, and that the fee was payable.

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(1) The Order as to Supreme Court Fees, 1884:

I. The fees and percentages contained in the schedule hereto are fixed and appointed to be taken in the High Court of Justice and in the Court of Appeal.

II. This Order shall not apply to the existing fees and percentages in respect of any criminal proceedings other than such proceedings on the Crown side of the Queen's Bench Division as the scale contained in the schedule hereto may be applicable to.

Schedule 52. On entering or setting down, or re-entering or re-setting down an appeal to the Court of Appeal, or a cause or matter for trial or hearing in any Court in London or Middlesex, or at any assizes, including hearing on further consideration where no such fee was paid on the original hearing, whether on summons adjourned from chambers or otherwise, and including special case, &c., 2*l.*

A. P. S.

THE QUEEN *v.* OVERSEERS AND SURVEYORS OF HIGHWAYS OF LANGRIVILLE.

THE QUEEN *v.* OVERSEERS OF COPPING SYKE.

1884
Dec. 8, 15.

Poor-rate—Union Assessment Committee Acts (25 *&* 26 *Vict. c.* 103), *s.* 19; (27 *&* 28 *Vict. c.* 39), *s.* 1—*Power to amend Valuation List—"Notice of objection in manner provided by* 25 *&* 26 *Vict. c.* 103, *with respect to objections"—Omission to give Notice of Meeting of Committee to Overseers.*

Under the "Union Assessment Committee Amendment Act, 1864," 27 & 28 Vict. c. 39, s. 1,—which enables the assessment committee to hear objections against a valuation list approved by the committee, and to amend such list, "after notice given at any time in the manner prescribed by 25 & 26 Vict. c. 103, with respect to objections,"—an amendment of the list is valid, although no notice of the meeting of the committee was given to the overseers of the parish to which the list relates as required by 25 & 26 Vict. c. 103, s. 19.

Rule calling upon the defendants to shew cause why a mandamus should not issue commanding them to amend certain rates by making them in conformity with the valuation list for the parish as amended by the assessment committee of Boston Union.

It appeared that part of the line of the Great Northern Railway was in the parish of Langriville, in the union of Boston, and having been assessed to the poor-rate, the company served notices of their objection to the valuation upon the overseers of the parish and the clerk to the assessment committee. The committee at a meeting to consider the objection reduced the company's assessment and wrote to the overseers to amend their valuation list accordingly. The overseers had received no notice of any meeting of the committee to hear and determine the objection as required by the Union Assessment Committee Act, 1862. (1)

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(1) By the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 18, any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation, &c., may, at any time after the deposit as aforesaid of such list, &c., give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof.

By s. 19, the committee shall hold such meetings as they may think necessary for hearing objections to the valuation lists, and shall, twenty-eight days at least before holding every meeting for hearing objections to valuation lists, cause notice of such meeting to be given to the overseers of the several parishes to which such lists relate, and such overseers shall, on the Sunday next following the receipt of such notice, publish the same in the manner in which notice

1884

THE QUEEN v. OVERSEERS OF LANGRIVILLE. THE QUEEN v. OVERSEERS OF COPPING SYKE.

W. Graham, for the defendants. The Act 25 & 26 Vict. c. 103, made provision for the appointment of an assessment committee, who are to examine and approve the valuation list prepared by the parish overseers, but having once approved of it they could only alter it by a supplementary list. By the later Act, 27 & 28 Vict. c. 39, s. 1, a general power of hearing objections and amending the list is conferred upon the committee subject to certain conditions. And the defendants contend that one of the conditions precedent to the exercise of this power is that notice of the meeting should be given through the overseers to all the parishes in the union. It must be conceded that all these parishes are interested in the proposed amendment. It cannot be expedient that the assessment of a particular parishioner should be reduced without hearing the representatives of the whole body of ratepayers. Secondly, the prosecution may argue that the order amending the list is subsisting and cannot be questioned in this proceeding. But where the amendment is at the instance of a party aggrieved, it can only be made in accordance with the regulations imposed by the Act, and as these regulations have not been complied with the order is a nullity.

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of a rate allowed by justices is by law required to be given, and the committee may at any such meeting hear and determine such objections; but the committee shall not be required to hold a meeting for hearing objections to the valuation list of any parish unless such notice in writing as hereinbefore mentioned of some objection or objections thereto have been given to the committee; and where a meeting is holden for hearing objections to the valuation list of any parish, the committee shall not hear any objection to such valuation list unless such notice as aforesaid has been given to the committee and to the overseers.

27 & 28 Vict. c. 39, s. 1. Before appealing to sessions against a poor-rate for a parish to which 25 & 26 Vict. c. 103, applies, notice of appeal is to be given to the assessment committee: "Provided that no person shall be empowered to appeal to sessions against a poor-rate in conformity with the valuation list approved by the committee, unless he shall have given the committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just, and which objection after notice given at any time in the manner prescribed by the 25 & 26 Vict. c. 103, with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their current rate accordingly."

Dugdale, Q.C., and *C. Dodd,* for the prosecution. First, the proper proceeding was to apply to quash the order of the assessment committee. Under s. 1 of 28 & 29 Vict. c. 39, so long as the order of the committee stands, the overseers are bound to obey it. The alteration made by the committee is in the nature of an order. Secondly, the omission to give notice of the meeting to the overseers does not make the act of the committee invalid. There is no reason why the person entitled to relief should suffer from the act of the assessment committee, and there is good ground for contending that the words "notice given in the manner prescribed by the Act with respect to objections," refer to 25 & 26 Vict. c. 103, s. 42, which makes provision for the service of any notice or statement required to be served upon the committee. The construction put by the defendants upon 27 & 28 Vict. c. 39, s. 1, requires the word "notice" to be read as "notices," for if they are right there must be, as a condition of the right to amend the list, a notice to the committee by the person aggrieved, and also a notice of the meeting to the overseers. *Reg.* v. *Edmonds* (1) is an authority to shew that an amendment of the list will not be invalidated by the disregard of some regulation in the first Act which does not expressly apply to such amendment.

Cur. adv. vult.

Dec. 15. The judgment of the Court (Hawkins, J., and Smith, J.) was delivered by

SMITH, J. :—This was a rule calling on the overseers of Langriville to shew cause why a mandamus should not issue commanding them to alter the rate as it stood in accordance with the amendment of the assessment committee. The point raised in the case is a short one. It is what is the meaning to be put upon the words "after *notice* given at any time in the manner prescribed by the Act with respect to objections." See s. 1 of the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39). On the part of the overseers it is contended that the notice therein mentioned means not only the notice to be given by any overseer or any person aggrieved by a valuation list to the

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(1) Law Rep. 7 Q. B. 598.

1884

The Queen v. Overseers of Langriville. The Queen v. Overseers of Copping Syke.

committee as is prescribed by s. 18 of the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), but also the notice to be given by the committee to the overseers of the meeting they are about to hold to hear objections as is prescribed by s. 19 of the said Act. On the other side it is contended that the notice referred to in s. 1 of the Act of 1864 at the most only means the notice to be given by the objector of his objection, as is prescribed by s. 18 of the Act of 1862.

The facts are shortly as follows:—

The Great Northern Railway Company's line runs through the parish of Langriville. The committee assessed the portion of the company's line which ran through the parish. The company were dissatisfied and proposed appealing to quarter sessions, but before doing so had to comply with the requirements of s. 1 of the Assessment Committee Act, 1864, 27 & 28 Vict. c. 39. The company duly gave notice to the committee of their objection against the valuation list. No notice was given as is prescribed by s. 19 of the Act of 1862. The committee having heard the company, determined to amend the list, and having done so, gave notice of the amendment to the overseers of the parish of Langriville in order that they might amend the rate as it then stood. This the overseers refused to do, alleging, as is the fact, that they had received no notice of the meeting of the committee as is prescribed by s. 19 of the Act of 1862.

We are of opinion that there was no necessity to give the notice, and that the section does not apply to the case now in hand. In our judgment the words in s. 1 of the Act of 1864, "after notice given," apply solely to the notice to be given by the objecting party to the committee. If the contention of the overseers is correct, we must read the words thus: "after *notices* given" which we have no warrant for doing, so as to bring in the notice prescribed by s. 19 of the Act of 1862, as well as the notice prescribed by s. 18 of the same Act. In the face of the words of the statute, we do not feel ourselves at liberty to inquire as to what was or was not the intention of the legislature in the year 1864, which we were strenuously invited to do by Mr. Graham. It seems to us that the case of *Reg.* v. *Edmonds* (1) goes to shew that at any rate all the requirements of the Act of 1862 do not apply to a rehearing by the committee of an objection by an objector before he proceeds to quarter sessions, and we are of opinion that the committee are entitled to hear his objection notwithstanding that the notice prescribed by s. 19 of the Act of 1862 has not been given.

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(1) Law Rep. 7 Q. B. 598.

It seems to us also that the words in s. 1 of the Act of 1864, "after notice given at any time in the manner prescribed by the said Act with respect to objections" refer to s. 42 of the Act of 1862, having reference to the manner in which the notice is to be served.

Rule absolute.

Solicitors for the prosecution: *Nelson, Barr & Nelson.*

Solicitors for the defendants: *Whyte, Collisson & Co., for Snaith, Boston.*

A. P. S.

Dec. 9.

THE BOURNEMOUTH COMMISSIONERS, THE URBAN SANITARY AUTHORITY FOR THE URBAN DISTRICT OF BOURNEMOUTH, *v.* WATTS.

Local Government Acts—Contract by Corporation—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 174, 257—*Sewering and paving—Liability for Proportion of Expenses—Contract not under Seal.*

In an action by a local authority to recover from the defendant his proportion of the cost of sewering, paving, &c., a street under the powers of the Public Health Act, 1875, s. 150, it appeared that part of the work, to an amount exceeding 50*l.*, had been done by contractors employed by the local authority, but that no written contract under the common seal of the authority had been made with them (as provided by s. 174):—

Held, by Hawkins, J., and Smith, J., that the defendant was nevertheless liable. By Smith, J., that the objection, if valid, would have been an objection to the apportionment, which could only be raised in the time and manner provided by s. 257.

CASE stated on appeal from the judge of the County Court of Hampshire.

Action to recover 7*l.* 16*s.* 10*d.*, the proportion adjudged to be due from the defendant under the Public Health Act, 1875, s. 150, for the cost of making good and sewering Heathpoult Road (continuation), Bournemouth. The particulars of claim were: Proportion 7*l.* 13*s.*; interest from the 17th of August, 1883, 3*l.* 10*s.*, 7*l.* 16*s.* 10*d.* At the trial it appeared that the defendant was the owner of premises abutting upon the road, which was a street (not being a highway repairable by the inhabitants at large) within the district of the plaintiffs as the urban sanitary authority, and which was not sewered, levelled, paved, &c., to their satisfaction, and that notice pursuant to s. 150 of the Public Health Act, 1875, had been served on the defendant among others to sewer, level, pave, &c., the road. It was also proved that all the requirements of the section had been complied with by the plaintiffs, and that the work was done by them pursuant to the section and not by the defendant.

The work was done partly by the staff of labourers and workmen in the regular permanent employment of the plaintiffs and partly by contractors. The total cost of the work was 101*l.* 5*s.*, of which 75*l.* 17*s.* 4*d.*, was the amount paid to the contractors. This sum of 101*l.* 5*s.* was apportioned by the surveyor of the plaintiffs amongst the different owners fronting upon the road, amongst whom was the defendant, and he was served with notice of the apportionment, and did not appeal against it. The amount apportioned to him was the above sum of 7*l.* 13*s.*

No contract in writing under the seal of the plaintiffs for the work was produced or proved, and it was admitted that the plaintiffs had not complied with any of the provisions of s. 174 of the Public Health Act, 1875. (1)

The defendant contended that the plaintiffs were not entitled to recover unless they proved that the requirements of s. 174 of the Public Health Act, 1875, had been complied with by them. The judge gave judgment for the plaintiffs with leave to appeal. The question for the opinion of the Court is whether under the circumstances the non-compliance by the plaintiffs with the Public Health Act, 1875, was an answer to the action.

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(1) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174. "With respect to contracts made by an urban authority under this Act, the following regulations shall be observed, namely,

"1. Every contract made by an urban authority whereof the value or amount exceeds fifty pounds shall be in writing and sealed with the common seal of such authority.

"2. Every such contract shall specify the work, materials, matters, or things to be furnished, had, or done, the price to be paid, and the time or times within which the contract is to be performed, and shall specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed."

Mackaskie, for the defendant. The provision in s. 174 of the Public Health Act, 1875, requiring a contract by a local authority the amount of which exceeds 50*l*. to be in writing and under seal is imperative and not directory, and must prevent the plaintiff from recovering in this action. The subject was fully considered in *Young* v. *Leamington* (1), and it was there held, approving of a similar decision in *Hunt* v. *Wimbledon Local Board* (2), that the contract under seal required by s. 174, could not be dispensed with, for the legislature intended to avoid the difficult questions which had been raised in the case of contracts by ordinary corporations. It is true that in *Reg* v. *Norwich* (3) the Court refused a certiorari to quash a resolution by an urban authority for the payment of expenses such as these, and incurred like these under an unsealed contract. But in that case there was an appeal to the discretion of the Court. Here the question is one of positive law, and is not referred to the discretion of the Court. The defendant is only liable under s. 150, to pay expenses incurred, i.e., legally incurred, by the local authority. The distinction is between a disability by the general law in the case of ordinary suitors, which may no doubt be waived, such as the Statute of Limitations, and a statutory regulation imposed on corporate bodies for the benefit of ratepayers, which cannot be dispensed with. *Frend* v. *Dennett* (4) shews that a local authority can only bind the rates by a contract in conformity with the Act of Parliament.

[Smith, J.:—Is not this an objection to the apportionment which ought to have been taken by written notice under s. 257.]

No; it is an objection to the validity of the proceeding and can be raised in an action: *Hesketh* v. *Local Board of Atherton*. (5)

H. Tindal Atkinson, for the plaintiffs, was not heard.

Hawkins, J. I am of opinion that our judgment must be for the plaintiffs, and that the case is free from difficulty. The facts are set out in the case, and the objection upon which the defendant relies is that part of the work in respect of which the

(1) 8 App. Cas. 517.
(2) 4 C. P. D. 48.
(3) 30 W. R. 752.
(4) 5 L. T. (N.S.) 73.
(5) Law Rep. 9 Q. B. 4.

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apportionment was made was done by contractors employed by the urban authority, and that no contract under seal was made with them so as to satisfy the provisions of the Public Health Act, 1875. One part of the work was done by the workmen employed by the urban authority, and as to that no question arises, but I am of opinion that if the whole of the work had been done by contractors that the absence of a sealed contract would have afforded the defendant no answer to this action. He is required by s. 150, to do this work, it has been done by the contractors, and the urban authority, acting bonâ fide, have paid them, and yet we are asked to say that s. 174, of the Act prevents them from recovering the amount of the defendant's proportion. But I think that although s. 174, might have given the plaintiffs a defence in an action brought by the contractors, they were not bound to avail themselves of this defence, and that they were as much justified in not setting it up as they would have been in declining to plead the Statute of Limitations. In *Reg.* v. *Prest* (1) a similar point arose. There a municipal corporation paid the town clerk for extra services as to which there was no retainer under seal, and a certiorari to quash the order for payment was refused. The observations of Lord Campbell are very much in point. This case has been followed more recently in *Reg.* v. *Norwich.* (2) These two cases warrant us in coming to the conclusion that an urban authority is not bound in an action for work done for them to set up the absence of a sealed contract, and if they do not choose to set it up as between themselves and the contractor any one in the position of the defendant cannot be allowed to raise the objection.

SMITH, J. I am of the same opinion. The amount for which this action is brought is the defendant's proportion of a larger sum, which was the cost of work done by the urban authority under the Public Health Act, 1875, s. 150. No question arises as to part of this work which was done by workmen in the employment of the urban authority; but it is objected that the cost of the other part, which was done by contractors with whom there was no contract under seal, cannot be recovered. The defendant contends that the authority need not have paid these contractors, and ought to have taken the objection that the contract was not under seal, and he has relied on *Young* v. *Leamington* (1) and *Hunt* v. *Wimbledon Local Board.* (2) But in those cases the point was a different one, and my judgment is not inconsistent with the view that in a proceeding between the contractors and themselves the authority might take the objection that there was no sealed contract, if an attempt were made to enforce an extortionate claim.

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(1) 16 Q. B. 32.

(2) 30 W. R. 752.

There is another point, which I also think is against the proposed defence. What the defendant is really trying to do is to open the apportionment of the expenses of the work done, and by s. 257, of the Act, this apportionment is binding and conclusive unless within three months from service of notice of the amount he gives written notice that he disputes it. *Hesketh* v. *Atherton* (3) decided that it was open to the landowner to dispute his liability after the three months by shewing that the street was not a highway, and therefore the local board had no jurisdiction, but that he could not then object to the apportionment. So that although the defendant might dispute his liability by saying that he was not a frontager, or on some such ground, he could not question the apportionment as he now proposes to do.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Lovell, Son, & Pitfield, for Nodder & Gater, Salisbury.*

Solicitors for defendant: *Taylor, Hoare, Taylor, & Box.*

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(1) 8 App. Cas. 517.

(2) 4 C. P. D. 48.

(3) Law Rep. 9 Q. B. 4.

A. P. S.

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1884
Dec. 1.

CLARK *v.* THE QUEEN.

Criminal Law—Vagrant Act (5 *Geo.* 4, *c.* 83), *s.* 4—"*Frequenting*" *a Public Thoroughfare with Intent to commit a Felony.*

A man who *frequents* a public street, having in his mind the intent to commit a felony when and wheresoever opportunity arises, is liable to the penalties of the Vagrant Act, 5 Geo. 4, c. 83, s. 4, even though no opportunity should arise, and may be committed as a rogue and vagabond, if the justices are satisfied on sufficient evidence, first, that he frequented the street, and secondly, that he did so with intent to commit a felony. The overt act, or the attempt to carry out the intent, is not an essential part of the offence against the Act.

The appellant was found and apprehended by two constables at about two o'clock in the morning in a public thoroughfare called Victoria Road, having in his possession a portion of a brass pump which appeared to have been wrenched off from the continuation-pipe. Being stopped and questioned as to how he became possessed of it and whither he was taking it, he gave an account which proved to be false, and also a false name and address. Being charged before two justices on suspicion of having stolen the pump, and the proof failing, he was then charged under 5 Geo. 4, c. 83, s. 4, with frequenting the street in question with intent to commit a felony; and on proof that he was an associate of thieves, and had four years before been convicted and sentenced to imprisonment for a felony,—although there was no proof that he had ever before been seen in the street in question, or that the pump had been stolen,—he was convicted as a rogue and vagabond under the 4th section of the Vagrant Act, for "frequenting the public thoroughfare with intent to commit a felony," and sentenced to be imprisoned:—

Held, that the evidence did not warrant the conviction, inasmuch as it did not shew a frequenting of Victoria Road with intent to commit a felony.

Appeal from a decision of justices for the borough of South Shields, under 20 & 21 Vict. c. 43.

Upon the hearing of a complaint preferred against the appellant under 5 Geo. 4, c. 83, s. 5, and 34 & 35 Vict. c. 112, s. 5, for that he, on the 5th of March, 1884, at and in the borough, then being a suspected person and reputed thief, unlawfully did frequent a certain street there called Victoria Road for a certain unlawful purpose, to wit, with intent to commit a felony, contrary to the statute, the magistrates convicted him and adjudged him to be committed to prison at Durham and there kept to hard labour for one calendar month.

The following facts were proved:—The appellant was found in Victoria Road, South Shields, by two constables, at 1.50 in the morning of the 5th of March, having in his possession part of a brass pump,—the chamber part, or that portion which is usually exposed above the ground for use. It appeared as if it had been torn or wrenched off from a continuation-pipe. The appellant was stopped on the suspicion of the constables, and was asked to give an account of how he became possessed of the pump and where he was taking it to. The appellant stated that he had got it from a Mr. Johnson, an engineer, who resided at No. 40, Meldon Terrace, and that he had just left Johnson, who was well known to him, at the door of that place, and was taking it to a Mr. Hepple an engineer in the Low Street, to be repaired; that his name was George Wilson; and that he resided at 52, Adelaide Street. The appellant was not known to the two officers; but the latter, having their suspicion aroused, took the appellant to the police-station; and on their way they met other constables to whom the appellant was known, not as George Wilson, but as William Clark. The appellant was locked up, and inquiries were made, but no such person as Mr. Johnson could be found at No. 40, Meldon Terrace, or at any other place. The appellant was then informed of the inquiries made by the police and of their inability to verify his statements as to the alleged ownership of the pump by Mr. Johnson, and that no such number as 40 existed in Meldon Terrace, and that no such person as Johnson lived there, and that an owner for the pump had not been found. It was further ascertained (and the appellant was informed of it) that Mr. Hepple had removed some time ago to North Shields, on the other side of the river Tyne; and he was also reminded that, having himself been a constable in the South Shields police-force, he well knew what his duty was, and what it was requisite he should do to satisfy the police: but this he refused to do.

The appellant was then charged by the police, under the statutes above mentioned, with being in Victoria Road on the morning in question with intent to commit a felony. To this charge he pleaded not guilty.

In addition to the facts above stated, it was proved on the evidence of two constables that the appellant was tried and convicted at the Durham quarter sessions on the 26th of February, 1876, for stealing rope, and by that Court sentenced to six months' imprisonment with hard labour; and that since then he had been seen in the company of convicted thieves, and was well known to the police as an associate of thieves.

It was contended for the appellant,—1. That there was no evidence of the appellant being a suspected person or reputed thief,—2. That the appellant did not "frequent" the street called Victoria Road,—3. That the appellant was not there for an unlawful purpose, or with intent to commit a felony,—4. That the circumstances shewed (if anything) that a felony had been committed, and that the lesser offence of vagrancy merged in the greater charge of felony, and that the appellant could not therefore be convicted under the statutes above mentioned.

The magistrates, however, being of opinion that the facts as proved before them clearly brought the appellant within the sections of the Acts of Parliament named, convicted him.

The question for the opinion of the Court was, whether the appellant was rightly convicted under the statutes named, on the facts proved before the magistrates.

Nov. 24, 1884. *John Edge*, for the appellant. There was no evidence that the appellant was frequenting a public thoroughfare with intent to commit a felony, or frequenting it at all within the meaning of 5 Geo. 4, c. 83, s. 4. To justify a conviction under this statute, even though the accused had once been convicted of felony, it must be shewn that he was doing something more than merely passing along a public highway. To satisfy the words of the statute, it must be shewn that he had been in the habit of going there in apparent pursuit of some unlawful intent. However notorious his character and however suspicious his antecedents, it is not enough to shew that he was there even at an unusually late hour, and that he declined to give an account of himself, or even that when unduly pressed he gave a false account of himself and of the property he was found carrying. Johnson, Webster, and all the other Dictionaries agree that "to frequent" a place is, to visit it often, to be much in any place.

[GROVE, J. I agree that to be there once is not a frequenting.]

The 34 & 35 Vict. c. 112, s. 15, merely enlarges the area mentioned in s. 4 of the previous Act: it throws no light upon the sense in which the word *frequenting* is used. There must be some connection between the intention to commit a felony and the frequenting of the place. It may be that a man frequents a public thoroughfare for the purpose of going to or from his work.

[GROVE, J. The intent is only to be gathered from the surrounding circumstances. The main question is whether from the whole purview of the enactment it is not apparent that "frequent" is to be construed in a sense different from its ordinary acceptance.]

It is observable that the legislature, when dealing with a person being "found" in a building or inclosed place, intended to make a difference between that state of things and the being found frequenting a public thoroughfare. Then, was there any evidence of an intent on the part of the appellant to commit a felony? He was arrested on suspicion that he had committed a felony. Having failed to prove that, the constables then charged him with frequenting the spot with intent to commit a felony; as to which the proof was equally defective.

[GROVE, J. The man was a convicted thief, an associate of thieves, and a suspected person. Does not that afford a reasonable presumption that his intent was to commit a felony?]

Not, it is submitted, under this section.

[He referred to *In re Cross* (1), *Reg.* v. *Brown* (2), and *Reg.* v. *Simpson.* (3)

J. Lawson Walton, in support of the conviction. The question is not whether the magistrates are right or wrong; but whether there was evidence upon which they might reasonably convict the appellant of the offence charged. It is said there was no evidence that he was frequenting Victoria Road with intent to commit a felony. The intent, however, can only be ascertained by the circumstances and the character and known antecedents of the party. Here, the appellant, a convicted thief and a known associate of thieves, is found in a public highway with obviously stolen property in his possession, of which when questioned he gives a false account. The hour is an unusual one for a respectable workman to be about: and moreover he gives a false name

(1) 1 H. & N. 651; 26 L. J. (M.C.) 28. (2) 17 Q. B. 833.
(3) 15 Justice of the Peace, 246, 790.

and a false address. Is not that enough to raise a presumption of an intention on his part to appropriate anything he can conveniently lay his hands on?

[HAWKINS, J. Where is the evidence that he was in the habit of frequenting Victoria Road with a felonious intent?]

A man who is found in a public thoroughfare at 2 o'clock in the morning, evidently out on a mauruading expedition, may fairly enough be said to be frequenting the place where he is found under circumstances such as are detailed in the case with intent to commit a felony, even though there was no proof that he was ever there before.

[GROVE, J. Must there not be some evidence that he had been seen there before?

[HAWKINS, J. The question is whether it is an offence within the Act that a man walks once down a street with intent to commit a felony if he gets a chance.]

The cases of *In re Cross* (1), *In re Jones* (2), and *Reg.* v. *Brown* (3), seem to support the view taken by the justices.

Edge was heard in reply.

Cur. adv. vult.

Dec. 1. GROVE, J. In this case the appellant was found (I use a general word) and apprehended by two constables at about two o'clock in the morning of the 5th of March last in Victoria Road, South Shields, having in his possession the chamber part of a brass pump (that is, the part which is usually exposed above the ground), and which appeared to have been torn or wrenched off from the continuation-pipe. Being stopped and questioned as to how he became possessed of it and whither he was taking it, he gave a false account and also a false name and address, and he was taken to a police-station on suspicion of having stolen the article. On being charged before the magistrates under the 5 Geo. 4, c. 83, s. 5, with being in Victoria Road with intent to commit a felony, it was proved that in February, 1876, he had been convicted and sentenced to six months' imprisonment for stealing rope. He being a convicted thief and giving a false name and address, the reasonable inference was that he had not come honestly by the thing he was carrying. The case presented to us does not state that he had ever been seen in Victoria Road before; but it states that he had been seen in the company of convicted thieves, and that he was known to the police as an associate of thieves.

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(1) 1 H. & N. 651; 26 L. J. (M.C.) 28.

(2) 7 Ex. 586; 21 L. J. (M.C.) 116.

(3) 17 Q. B. 833.

Two objections were mainly relied upon before the magistrates, first, that there was no evidence of the accused being a suspected person or reputed thief; secondly, that there was no evidence that he *frequented* Victoria Road, or that he was there for an unlawful purpose or with intent to commit a felony.

Upon the first question, I must own that I could not say that the magistrates were wrong. Looking at the unseasonable hour and at the surrounding circumstances, I think they might not unreasonably have supposed that the appellant had committed a felony or was prowling about to discover something worth stealing. If, therefore, the decision of the magistrates had rested on that ground, I should not have felt disposed to quarrel with it.

The real difficulty arises upon the second question—upon the words of s. 4 of 5 Geo. 4, c. 83—which (amongst other things) enacts that "every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit a felony," shall be deemed a rogue and vagabond, and liable to be imprisoned and kept to hard labour for any time not exceeding three calendar months. The whole difficulty arises from the use of this word "frequent." So far as the present case goes, I cannot entertain a doubt that this man deserved to be convicted. But, upon carefully considering the matter, I am unable to come to the conclusion that he frequented Victoria Road or any street or highway leading or adjacent thereto with intent to commit a felony, within the words of this clause. There is no evidence that he was ever before seen in Victoria Road or in any street or place leading thereto at all. To sustain this conviction, we must give to the word "frequent" a meaning which has never been given to it before. No decided case can be cited to shew that this provision of the Act has ever been applied to a convicted thief wandering about at night under such circumstances as reasonably to shew that he intended to commit a felony in a street or place where or adjacent to which he has never been seen before: nor do the definitions of the word given in any of the dictionaries warrant such an interpretation as that now sought to be placed upon it. The 15th section of 34 & 35 Vict. c. 112, which professes to interpret s. 4 of 5 Geo. 4, c. 83, makes no alteration in this respect. We must assume the legislature to have meant what it has said. Two words are used in reference to offences of this kind, viz. "found" and "frequent," the former being used as applicable to the case of a person apprehended in a building or inclosed ground, where the necessary inference would be that the purpose was unlawful, and therefore it would be enough to shew that the party was there only once. But, when the Act of Parliament comes to deal with streets and uninclosed places, to prove a felonious intent you must shew that the accused was seen there more than once at least: how often I decline to suggest. The word "frequent," therefore, would seem to be used in contradistinction to the word "found." A single visit to a place, or once passing through a street, can in no sense be said to be a "frequenting" that place or street. Nor can the fact of the appellant having a long time ago been convicted of felony affect the interpretation to be put upon the words of the statute.

I therefore reluctantly come to the conclusion,—without at all reflecting upon the magistrates who heard this case,—that this conviction is wrong, and must be quashed.

None of the cases referred to in the course of the argument seem to me to throw any light upon the construction of the words of the statute.

HAWKINS, J. I am also of opinion that this conviction cannot stand.

By 5 Geo. 4, c. 83, s. 4, it is enacted that "every suspected person or reputed thief *frequenting* any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit a felony," shall be deemed a rogue and vagabond and liable to be imprisoned and kept to hard labour for any time not exceeding three calendar months.

Upon the construction of this section grave doubts for a considerable time existed as to whether it justified the commitment of a person frequenting a public street or highway with intent to commit felony, unless such street or highway led to a river, &c., or a place of public resort, or was adjacent thereto. In 1850, Patteson, J., on habeas corpus, discharged three reputed thieves frequenting a street at the west end of London with intent, &c., on the ground that the street was not shewn by the commitment to lead to a river or place of public resort, &c. In a subsequent case, *Reg.* v. *Brown* (1), in 1852, the Court of Queen's Bench (Patteson, J., dissenting) held the contrary view, and that this section applied to any street or place adjacent to a street. In the same year, in *In re Jones* (2), the Court of Exchequer dissented from this judgment of the Queen's Bench, and discharged a suspected person charged with frequenting Regent Street with intent to commit felony, on the ground that the commitment did not state that the street frequented by the prisoner was a street leading to a river, &c., or a place of public resort, or a street adjacent to a place of public resort: and this view was adhered to by the Court of Exchequer in *In re Timson* (3), in 1870. To remedy the inconvenience arising from these conflicting interpretations of the law, s. 15 of 34 & 35 Vict. c. 112 (1870) enacts that s. 4 of 5 Geo. 4 shall be construed as if, instead of the words "highway or place adjacent," there were inserted the words "or any highway or any place adjacent to a street or highway." The effect of this enactment is, to render every suspected person or reputed thief *frequenting any* street or highway or *any* place adjacent to a street or highway with intent to commit felony, liable to be dealt with as a rogue and vagabond.

Under these two statutes the appellant was convicted by the magistrates of South Shields for that he "being a suspected person and reputed thief, unlawfully did frequent a certain street there called Victoria Road, for a certain *unlawful purpose,* to wit, with intent to commit a felony," &c.; and we are now asked to say whether upon the evidence that conviction was justified in law.

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(1) 17 Q. B. 833.

(2) 7 Ex. 586; 21 L. J. (M.C.) 116.

(3) Law Rep. 5 Ex. 257.

Several objections were raised by the appellant. First, that there was no evidence of his being a suspected person or reputed thief. As to this, one has only to read the statement of facts in the case to see that it is unarguable. Equally unarguable in my opinion is the objection that there was no evidence of an intent by the appellant to commit a felony, when the facts proved are taken in conjunction with that part of s. 15 of 34 & 35 Vict. c. 112, which enacts that, in proving the intent to commit a felony, it shall not be necessary to shew that the person suspected was guilty of any particular act or acts tending to shew his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony."

To the objection that the circumstances shew, if anything, that a felony had been committed, and that the lesser offence of vagrancy merged in the greater offence of felony, I have only to observe that the evidence was not such as conclusively to establish that a felony *had* been committed by the appellant; and certainly the magistrates did not so find. And, even if it had been proved that the appellant had committed one felony, it does not follow that he had not an intent to commit another.

The objection that there was no evidence to warrant the justices in finding that the appellant "*frequented*" the street called Victoria Road as alleged, is of a much more serious character; and I am of opinion that it must prevail. The only evidence on this part of the case was, that, at ten minutes before 2 o'clock in the morning of the 5th of March, 1884, the appellant was found by two constables in Victoria Road, South Shields, having then in his possession part of a brass pump which they had every reason to suspect had been stolen by him. There was no evidence of the appellant having been in the street on any other occasion with intent to commit a felony,—or, indeed, at all. Can the appellant, then, by any reasonable interpretation of the word be said to have been a person "*frequenting*" the street with intent, &c.? I think not. In Webster's Dictionary, the verb "*to frequent*" is thus defined,—"to visit often; to resort to often or habitually." This is also the popular understanding of the word. In this sense also, I think, the legislature used it; for in the same section 4 of 5 Geo. 4, I find a variety of acts which once (that is to say, on one single occasion) committed create offences punishable as acts of vagrancy, e.g. to tell fortunes, to wander abroad and lodge in a barn, &c., having no visible means of subsistence, to wander about and endeavour by exposure of wounds &c. to gather alms, to run away and leave a wife &c. chargeable to the parish, to play or bet in the streets with a table &c., to have possession of a picklock with intent feloniously to employ it, *to be found in* or upon any dwelling-house &c. for any unlawful purpose. All these are punishable as acts of vagrancy though they be committed on one occasion only; whereas, the word "frequenting" was used when the offence of which the appellant was convicted was created.

The case of *In re Cross* (1) was cited in support of this conviction. In that case the Court supported a commitment which alleged that the prisoner, "being a suspected person and reputed thief *frequenting* the public streets and places of and in the said city (of London), then and there was found in Railway Place, being a public thoroughfare and one of the places of public resort of and in the said city, with intent feloniously to steal the money, goods, and chattels of Sarah Seymour from her person." According to the report in Hurlstone & Norman, the only point taken for the prisoner was, that it did not appear that the prisoner frequented the spot where he intended to put his felonious intent into execution, viz. *Railway Place*; and the Court held that this was unnecessary; Martin, B., saying "A reputed thief frequenting Fleet Street cannot escape by going down Inner Temple Lane to commit a felony,"—meaning, as shewn by the Law Journal report, "If a person *frequents* Fleet Street, and *attempts* to pick a pocket in Inner Temple Lane, that is within the Act of Parliament." The case is very unsatisfactorily reported;

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(1) 1 H. & N. 651; 26 L. J. (M.C.) 28.

and the real objection to the commitment does not appear to have been taken, viz. that it did not state that the prisoner frequented the public streets, &c., with intent to commit a felony, but only that the felonious intent existed in Railway Place, where he was only shewn to have been once; and it was quite consistent with the averment, that he frequented the public streets with an innocent or lawful intent. In discussing and deciding that case, it seems by both counsel and Court to have been assumed, though there was in fact no averment to that effect, that the frequenting the "public streets" was with the felonious intent charged. On this assumption (but only on this assumption), I entirely agree in the decision; for, I am clearly of opinion that a man who *frequents* a public street, having in his mind the intent to commit a felony when and wheresoever opportunity arises, is liable to the penalties of the Vagrant Act, even though no opportunity arises, and may be committed as a rogue and vagabond, if the justices are satisfied on sufficient evidence, first, that he frequented the street, secondly, that he did so with *intent to* commit felony. The overt act, or the attempt to carry out the intent, is not an essential part of the offence against the Vagrant Act of Geo. 4: and it was decided in *Reg.* v. *Brown* (1) and *In re Jones* (2) that it is not necessary that the intent should be to commit a felony *there*, that is, in the street frequented. Read in this light, *Cross's Case* (3) is no authority either against or in favour of the present appellant.

I am, then, in the absence of any authority to the contrary, and for the reasons I have endeavoured to express, reluctantly compelled to come to the conclusion that this commitment ought not to stand, because there was no evidence of a "frequenting" any public street with a felonious intent; and that the mere finding upon *one occasion* of a man in a public street under circumstances leading to the conclusion that he intended to commit a felony is not sufficient to satisfy the statute. What amounts to a "frequenting" a street must depend upon the circumstances of each particular case; I only say *one* visit to it does not; and that is all that is proved by the evidence before us.

In order that the error may be avoided in future, I think it

(1) 17 Q. B. 833.

(2) 7 Ex. 586.

(3) 7 Ex. 586; 21 L. J. (M.C.) 28.

right to point out, that, apart from any question of evidence, the statement of the offence in the commitment is open to question. It alleges that the appellant frequented the street for an *unlawful purpose*, to wit, with intent to commit a felony,—the intent to commit a felony being only charged under the videlicet: without such videlicet the commitment would be clearly bad; for, though it is an offence within the Vagrant Act to be found on private premises enumerated in s. 4 for *any unlawful purpose*, it is not an offence against that Act to frequent a public street, &c., unless with intent to commit felony, which intent ought to be alleged directly, and not as in the commitment before us. This conviction must for the reasons I have given be quashed.

Conviction quashed.

Solicitors for appellant: *Gregory & Co., for Ch. W. Newland, South Shields.*

Solicitors for respondent: *Clarke, Rawlins, & Co., for Joseph M. Moore, Town Clerk, South Shields.*

J. S.

ADAM, SON, & Co. *v.* W. TOWNEND & Co.

Dec. 9.

Practice—Service of Writ on one Member of a Trading Partnership—Appearance by him only "as a partner of the firm"—Order XII., r. 15.

A writ was issued against a trading partnership (unincorporated), and served upon a member of the firm, who entered an appearance, "W. N., a partner of the firm of W. T. & Co." There was no service upon or appearance by the other members of the firm.

Held, that leave to sign judgment against the firm for default of appearance could not be granted.

Jackson v. *Litchfield & Sons* (8 Q. B. D. 474) followed.

ACTION by drawers against the acceptors of a bill of exchange for 1091*l.* 7*s.* 6*d.*

The bill was addressed to Messrs. W. Townend & Co., a trading firm not incorporated (the drawers, wool-brokers, at Leith, being also a trading firm unincorporated), and accepted "Walter Townend & Co." The writ (with statement of claim indorsed, for 1092*l.* 10*s.* 11*d.*, the amount of the bill with interest and notarial charges) was issued against the defendants as "Walter

Townend & Co.," and was served upon William Newbigging, by whom an appearance was entered thus,—"William Newbigging, a partner of the firm of Walter Townend & Co.," no appearance being entered for the other members of the firm.

The plaintiffs applied by summons to a master for leave to sign judgment against the firm for default of appearance, on the ground that an appearance by one member of a firm is not an appearance by the firm. The master refused the application, indorsing his reasons upon the summons, "Because, in *Jackson* v. *Litchfield & Sons* (1) it was decided that, where one member only enters an appearance, judgment could, nevertheless, only be entered against the firm; and, as the Rules (Order XII., rr. 15, 16) contain no provision for an appearance by a firm qua firm, but direct that, where a firm is sued as a firm, the partners shall appear individually in their own names, an appearance, although by only one partner, is a sufficient appearance to prevent any judgment against the firm for default of appearance by the firm. After judgment against the firm, ample provision is made as to execution against individual members."

The master's decision was affirmed by the judge.

Boydell Houghton, by way of appeal, moved for judgment against the firm. The appearance by Newbigging, though describing himself as "a partner of the firm of W. Townend & Co.," enured only as an appearance by himself individually, and not for the firm, and consequently the other partners were in default.

MATHEW, J. You cannot have judgment against the partner who has appeared, which is in effect what you are asking for; nor can you have judgment against *the firm* including Newbigging. Your proper course would seem to have been to apply to strike out the appearance by him: this you have not done. The motion must be refused.

DAY, J. The appearance by Newbigging, though somewhat informal, is regular as far as he is concerned.

Motion refused.

Solicitor for plaintiffs: *S. Seal, for Rawson, George, & Wade, Bradford.*

J. S.

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(1) 8 Q. B. D. 474.

SMITH v. DART & SON.

1881
Nov. 28.

Ship—Charterparty—"Excepted Dangers"—Option to cancel for non-arrival at Loading Port.

By a charterparty of a steamship it was agreed that she should go to "three safe loading places" between two named ports and there load from the charterers a cargo of oranges and being so loaded proceed to London . . . . and deliver the same pursuant to bills of lading . . . . (the act of God . . . . and all dangers of the seas, rivers, and steam navigation of what nature and kind soever during the said voyage always excepted), and the charterers thereby promised to load the cargo, and stipulated, after a provision for working and lay days, that "should the steamer not be arrived at first loading port free of pratique and ready to load on or before the 15th of December next, charterers have the option of cancelling or confirming this charterparty."

By dangers of the seas, the steamer, although arrived at the first loading port, was not free of pratique and ready to load on the 15th of December, and the charterers therefore cancelled the charterparty.

At the trial of an action against them for not loading the cargo, the judge left to the jury the disputed question whether the port was a "safe loading place," but being asked by them for his opinion thereon, gave it, and they found in the affirmative:—

Held, (1) that this expression of opinion was under the circumstances no misdirection; (2) that the excepted dangers clause applied only to the voyage, and not to the clause giving the option to cancel the charterparty if the ship was not ready to load on the day fixed, and therefore the cancellation was justified.

Motion to set aside a verdict and judgment entered for the defendants, and for a new trial on the grounds of misdirection and that on the findings of the jury the judgment so entered was wrong.

Action by shipowners against the charterers of a steamship for breach of charter by not loading a cargo. At the trial before Hawkins, J., and a special jury, it appeared that by charterparty of the 14th of November, 1881, of a steamship, it was agreed inter alia that she should proceed to "three safe loading places between Castellon and Malaga," . . . . or as near thereunto as she might safely get, and there load from the charterers 7000 cases of oranges, and being so loaded forthwith proceed to London $\frac{\text{and}}{\text{or}}$ Hull . . . . and deliver the same agreeably to bills of lading (the act of God . . . . "and all and every other dangers and accidents of the seas, rivers, or steam navigation of what nature and kind soever during the said voyage always mutually excepted)," and the charterers thereby promised and agreed to load the steamer with the said cargo at the port or ports of loading, and to pay freight. Seven working days to be allowed for loading. "Lay days not to commence before the 7th of December next. . . . Should the steamer not be arrived at first loading port free of pratique and ready to load on or before the 15th of December next, charterers have the option of cancelling or confirming this charterparty."

On the 11th of December the captain was ordered to proceed to take cargo at Burriana, and on the 13th anchored off Burriana in 6½ fathom water heavy E.N.E. sea running. The wind and sea increased, the captain could not go on shore to obtain pratique, and on the 15th the vessel had to proceed to Valencia for refuge, and went into harbour there. On the 16th of December the captain informed the charterers of these facts, and on the same day they replied that the steamer not being in pratique on the evening of the 15th instant at Burriana, the first loading port, they cancelled the charter. The vessel returned to Burriana on the 17th.

It was proved or admitted at the trial that Burriana was exposed to the wind from many points of the compass, and during bad weather vessels there were sometimes in danger of being driven ashore, but that many steamers were loaded there, and by ordinary and well-known precautions, such as keeping their fires alight, and, if necessary running out to sea, could, although occasionally interrupted by the weather, load cargoes there in safety.

There was a conflict of testimony as to whether under these circumstances Burriana was a "safe loading place."

The learned judge left to the jury the question whether Burriana was a safe loading place. They retired to consult, but came back after a long absence and asked the learned judge for his opinion as to what was a safe loading place, and he said that if the vessel could lie in the roadstead, and by the use of proper well-known precautions, such as keeping her fires banked and otherwise, she could in safety receive cargo there, even though she received it inconveniently and the receipt of it might be interrupted by wind tending to drive the vessel on shore and so render it necessary to run out to sea until the weather abated, the loading place would, in his opinion, be safe. But the learned judge repeated that the question was for the jury to decide, and again read some of the evidence to them.

The jury found that Burriana was a safe loading place, but that it was solely by badness of weather that the vessel had not pratique on the 15th of December, and that during the time she lay there it was impossible for the plaintiff to get pratique.

The verdict was entered for the defendants.

C. Hall, Q.C., and *Witt*, for the plaintiffs, in support of the motion. The question whether Burriana was or was not a safe loading place was no doubt a question for the jury, and the summing-up and direction of the learned judge were unexceptionable, but he went somewhat beyond his functions in expressing his opinion on the inference of fact as to what was a safe port, although that opinion was correct.

Secondly, the ship was prevented from being "free from pratique, and ready to load on the 15th of December," by dangers of the seas within the excepted perils clause of the charter, which extended to the option of cancellation clause, and therefore the charterers could not justify the cancellation of the charter and failure to load: *Barker* v. *McAndrew* (1); *Harrison* v. *Garthorne* (2).

Finlay, Q.C., and *Nelson*, shewed cause. The excepted peril clause has no application to the option clause, which is in a different part of the charter. The voyage is from the port of loading to Hull or London, and the dangers of the seas "during the said voyage" only are excepted. The cancellation clause is unqualified. The shipowner ran the risk of failing to arrive on the 15th of December, and undertook to arrive on that day ready to load. He failed to do so and the charterers had a right to exercise their option. The clause as to dangers of the seas does not apply to the stipulation that the ship should arrive, which was a condition precedent: *Crookewit* v. *Fletcher* (3); *Glaholm* v. *Hays*. (4)

(1) 18 C. B. (N.S.) 759.
(2) 26 L. T. (N.S.) 508.
(3) 1 H. & N. 893; 26 L. J. Ex. 153.
(4) 2 M. & G. 257; 10 L. J. C. P. 98.

C. Hall, Q.C., replied. The position of the clause in the charter cannot affect its application. The excepted dangers clause governs the whole adventure.

Cur. adv. vult.

THE COURT said that there was no misdirection nor miscarriage at the trial by the learned judge assisting the jury at their request with his opinion on the question as to the "safe loading place," which he expressly left for them to decide. On the second point,

Nov. 28. LORD COLERIDGE, C.J., said:—A day was fixed on which the steamer should arrive free from pratique and ready to load, and if the steamer did not arrive on that day the charterers were to have the option of cancelling the charter. The evidence is that the steamer did not arrive in the port of loading on the 15th December so as to be free from pratique on that day. She arrived on the 13th, but was not free of pratique on the 15th, that would be a ground which would give the charterers an option of cancelling, which they exercised. The question is whether the clause giving that option is an independent stipulation, or whether it overrides the whole charterparty down to the point where the clause stands. I have come with regret and after some hesitation clearly to the conclusion that the stipulation does override the whole charter down to the place in which it is inserted, and on that ground, as the steamer did not arrive at the time prescribed, the charterers had a right to cancel, and as they did cancel the charter, the judgment was rightly entered and there should be no new trial.

MATHEW, J. I am of the same opinion. At first I was inclined to adopt the view suggested by the learned counsel that the well known excepted perils clause applied to the clause which gave the option of cancellation if the vessel did not arrive until the 15th of December. But, on considering the point, it is clear that the clause giving the option would be practically struck out of the charter if it were to be construed "the vessel must be ready to load by the 15th unless prevented by dangers of the sea." That is an interpretation I should be very slow to put on a charter, and which would nullify the express provision. The next observation is that it is peculiar in this respect, viz., that it is a clause which imposes no obligation which would be the subject of an action against the shipowner. Unlike the other clauses by which the shipowner undertakes to do something, in this particular clause all that is provided is that in the event of the ship not being ready to load at the time appointed the charterers shall have the option of cancelling.

This is a charter of a vessel for importation of goods which are required in a particular season. It is important that the shipment shall be as early as possible, and such charters often contain stipulations for shipment in a particular month, and that unless the ship shall arrive at a particular time the charter shall be cancelled. On the other hand it is a contract with respect to a steamer, and charterers are apt to suppose that with a steamer all will go on well, and the shipowner might also fairly suppose that the vessel would arrive in time. In this particular case the shipowner appears to have attempted to run the time too close. He got in shortly before the 15th of December, and a storm arose and he had to put back, and it became impossible to be at the port on the 15th free of pratique and ready to load, and the charterers had their option of cancelling and exercised it, and therefore I think the rule must be discharged.

A. L. SMITH, J. I also am of the same opinion. The question is whether the exception in the charter as to dangers applies to the whole contract of voyage together with the option clause, or only to the contract of voyage. I am of opinion that it applies only to the contract of voyage. That exception is put into the charter in favour of the shipowner, for without that exception the ship would have been bound to go to the port of loading and discharge, and if the ship had sunk at sea the owner would have had no answer to the complaint of his failure to get to the port. But when we come to the option clause, that is not in favour of the shipowner but of the charterers, and they say, "Although we agree to load at a port of loading we must have the ship there by the 15th, and have an option of not loading if she does not arrive in time." That means "We have goods coming forward and we want the ship there by a certain day." I agree with what my brother Mathew said, but I do not place stress on the nature of the goods. The shipowner does not contract to get there by a certain day, but says, "If I do not get there you may cancel." It is an absolute engagement that if he does not get there the charterers may cancel.

Rule discharged.

Solicitors for plaintiff: *Pritchard & Sons.*
Solicitors for defendants: *Lowless & Co.*

J. R.

Dec. 2.

RIDGWAY *v.* WARD.

Baker—Sale of Bread—Previous Order—Delivery by Cart without Beam and Scales—6 & 7 Wm. 4, *c.* 37, *ss.* 6, 7.

The appellant, a baker, having received through his traveller an order from a customer for a quartern loaf, the manager of the baker's shop selected, weighed, and appropriated to the customer a loaf which was then carried out in a cart and delivered to the customer, on credit, by a servant of the baker without being provided with any beam and scales with proper weights:—

Held, that the appellant was rightly convicted under 6 & 7 Wm. 4, c. 37, s. 7, which enacts that every baker beyond certain metropolitan limits who shall "carry out bread for sale in and from any cart" shall be provided with a correct beam and scales with proper weights, in order that all bread sold by him may be weighed in the presence of the purchaser; and in case any such baker shall "carry out or deliver any bread" without being provided with such beam and scales with proper weights, he shall be liable to a penalty.

CASE stated by justices of Staffordshire under 20 & 21 Vict. c. 43.

The appellant was convicted at petty sessions on an information which charged that he, being a baker of bread carrying on business at Longton, on the 10th of April, 1884, at the parish of Draycott, did unlawfully cause his servant to carry out and deliver bread from a cart without being provided with a correct beam and scales with proper weights contrary to 6 & 7 Wm. 4, c. 37, s. 7.

The appellant was a grocer, provision dealer, and baker carrying on business at a shop in Longton.

On the 9th of April, 1884, the appellant's traveller called at the house of Miss Radcliffe, a customer who resided at Draycott, which was some miles distant from the shop of the appellant, and took from her an order for a quartern loaf of bread at the price of 5*d.* and certain articles of grocery which were together under the value of 10*l.* The order was on the same day given by the traveller to the manager of the appellant's shop at Longton to make up. The goods ordered by the customer of the traveller, including the quartern loaf of bread, were selected and appropriated by the manager on the 10th of April, 1884. The loaf was immediately prior to being placed with the remainder of the goods set apart for the customer, weighed by the manager and found to be of the required weight of 4 lbs.

On the said 10th of April the manager caused one Swainey, a servant of the appellant, to take and deliver to Miss Radcliffe the goods and quartern loaf of bread from a cart, not at the time being provided with weights and scales mentioned in ss. 6 and 7 of the Act. Miss Radcliffe paid the traveller on the 23rd of April for the goods supplied in pursuance of the order so given on the 9th of April preceding. The usual course of dealing between the appellant and Miss Radcliffe was that the traveller should receive an order for goods on one Wednesday, that the goods should be delivered on the following day, and that payment should be made by Miss Radcliffe for such goods to the traveller on his next subsequent visit on the Wednesday but one following. The cart from which appellant's servant delivered the goods to Miss Radcliffe contained parcels of goods all of which had been previously ordered by customers in a similar manner to those ordered by Miss Radcliffe, and contained no bread or articles which had not been so ordered and weighed.

The loaf of bread so ordered and delivered to Miss Radcliffe was afterwards weighed by her own scales and was found to be of the full weight of 4 lbs.

It was contended on behalf of the appellant that he was not obliged to provide his cart with weights and scales when he went to deliver the bread under the circumstances set forth; that the sale took place when the order for the loaf of bread had been given and accepted and the loaf had been appropriated.

It was also contended that 6 & 7 Wm. 4, c. 37, s. 7, applied only to bakers or sellers of bread who should convey and carry out bread for sale, and their journeymen, servants, or persons employed by them.

The justices considered it doubtful whether under the circumstances set forth the sale was complete until delivery, and considered that in point of law there was nothing to alter the defendant's position from that of a baker to a carrier. They also thought that the circumstances in *Robinson* v. *Cliff* (1) were so nearly identical with the circumstances in this case that they were bound on the authority of that case to convict, and accordingly convicted the defendant in the penalty of 1*s*. and costs.

If their decision was right the conviction was to stand, but if otherwise the summons was to be dismissed.

Rose, for the appellant. When bread is sold by a baker either in a shop, or from a cart used for hawking bread, he must be provided with the means of weighing it: 6 & 7 Wm. 4, c. 37, ss. 6, 7. (2) But the Act does not require him to carry a beam and scales with bread delivered in fulfilment of a previous contract of sale. Some words of the first part of s. 7, which are omitted for the sake of brevity from the second part imposing the penalty, must be inserted into the second part. The first part of s. 7 enacting that "every baker, and every journeyman, servant or other person employed by such baker, who shall carry out bread for sale in and from any cart," must be read "who shall carry out bread in, for sale from any cart," and many words of the first part of s. 7, which are for the sake of brevity omitted from the second part, must be read into the second part to limit the operation of the penalty clause. For example, after "other person" the words "employed by such baker" must be inserted, and after "carry out or deliver any bread," the words "for sale in and from any cart" must be inserted. Otherwise any baker delivering any bread to any one in any manner would be within the terms of the clause, unless he was provided with a beam and scales. There is no penalty in s. 6, and the penalty clause applies to both s. 6 and 7, hence the use of the word "deliver." The baker is liable only if he carries out bread in a cart for sale or delivers bread for sale without having a beam and scales. The words "in a cart" must certainly be implied, and so must the words "for sale." The legislature cannot have meant that every baker's-man who takes out a loaf, even in a basket, should have a beam and scales. In the present case the loaf was "sold" within the meaning of the Act when, having been set apart, and weighed, it was put into the cart for delivery to the customer, and it is unnecessary to consider the difficult question as to the passing of the property. But there is authority for saying the property had passed: Benjamin on Sale, 265. *Robinson* v. *Cliff* (1) was a clear case of hawking bread. No order for any quantity was previously given. The sale was at the customer's door.

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(1) 1 Ex. D. 294.

(2) By 6 & 7 Wm. 4, c. 37, every baker or seller of bread beyond the limits [of the bills of mortality and ten miles of the Royal Exchange], and every journeyman, servant, or other person employed by such baker or seller of bread, who shall convey or carry out bread for sale in and from any cart or other carriage shall be provided with and shall constantly carry on such cart or other carriage a correct beam and scales with proper weights, or other sufficient balance, in order that all bread sold by every such baker or seller of bread, or by his or her journeyman, servant, or other person may from time to time be weighed in the presence of the purchaser or purchasers thereof . . . .; and in case any such baker or seller of bread, or his or her journeyman, servant, or other person shall at any time carry out or deliver any bread without being provided with such beam and scales with proper weights or other sufficient balance, or whose weights shall be deficient in their due weight . . . or shall at any time refuse to weigh any bread purchased of him, her, or them, or delivered by his, her, or their journeyman, servant, or other person, in the presence of the person or persons purchasing or receiving the same, then and in every such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding 5*l*.

The respondent did not appear.

Cur. adv. vult.

Grove, J. I have come to the conclusion that the appeal must fail. Sect. 6 enacts that bakers who sell bread in a shop shall have a correct beam and scales with weights "in order that all bread there sold may from time to time be weighed in the presence of the purchaser or purchasers thereof." But the section on which the case depends is s. 7, and every word is important. The contention on behalf of the appellant is that s. 7 does not apply to the delivery of bread in consequence of a previous

(1) 1 Ex. D. 294.

order, but only to bakers who hawk bread about "for sale,"—to cases in which the whole transaction of sale takes place at the delivery of the bread and while it is being delivered, and when the baker is travelling about for the purpose of selling bread—just as an itinerant person who carries goods in a caravan for sale at fairs, not going to particular customers, but—finding out anybody who will buy. I am of opinion that the Act goes further than that. The object of this Act evidently is, that when bread is delivered to a purchaser he shall have an opportunity of seeing it weighed. He may not have scales and weights of his own, or, if he had, the baker might dispute the correctness of them, so the Act obliges bakers to have proper scales and weights when the bread is delivered, otherwise in all the large number of cases when bakers deliver bread in pursuance of a previous order the Act would be defeated. For suppose the purchaser in the present case actually saw *a* quartern loaf weighed and put aside in the shop, and a quartern loaf was afterwards sent to her, the object of the Act would not be attained unless she could see that quartern loaf weighed at her house. But I need not consider such a case, because here the loaf was not weighed before her in the shop, nor had she chosen it there, and asked the baker as a favour to send it to her. The bread was only weighed by the baker's manager himself in the absence of the purchaser, and therefore if we put the construction which has been suggested on the section the object of the Act would be defeated, because the baker would weigh at his own will, and if the baker were dishonest—as the appellant was not—he might on receiving an order for so many quartern loaves, weigh them at home, and on delivering them at the house of the purchaser say that he had not brought and was not bound by the Act to bring any scales and weights to weigh the bread there, and that the purchaser must take the loaves or would be sued in respect of them. Nevertheless we should have to construe the Act according to its words even if they failed to effect the object of it. But are the words so ineffective? "*Every* baker or seller of bread . . . who shall convey or carry out bread for sale in and from any cart or other carriage shall be provided with and shall constantly carry in such cart or other carriage a correct beam and scales with proper weights." Perhaps if the section stopped there, the words "carry out bread for sale" might mean "carry out bread for the purpose of selling it when carried out." But the section goes on "in order that all bread —(not all bread "carried out for sale" but)—sold by every such baker, &c., . . . may from time to time be weighed in the presence of the purchaser or purchasers thereof." That clause shews to me clearly the object of the Act, but the section proceeds still further, "and in case any such baker or seller of bread, or his or her journeyman, servant, or other person, shall at any time" —not "*sell*" but—"carry out or deliver any bread without being provided with such beam and scales with proper weights . . . every such baker or seller of bread" shall be liable to a penalty. The penalty is imposed on every baker or seller of bread in case he at any time carries out or delivers any bread without being provided with a beam and scales and proper weights. I think, therefore, the case is not only within the scope, but within the words of the Act. In *Robinson* v. *Cliff* (1), which no doubt differs in one point from the present case, Bramwell, B. (p. 297), giving judgment, says "I incline to think that the counsel for the appellant was so far correct in contending that the earlier part of s. 7 is applicable to hawkers of bread only, and that s. 6 relates to bakers who keep shops; but then it seems to me clear that the penal clause in s. 7 applies to the sale and delivery of bread by both classes of bakers." That is my judgment here—the penal clause in s. 7 applies to both classes of bakers. Every baker who carries out or delivers bread without being provided with a proper beam and scales and weights is liable to a penalty. Here the appellant has carried out and delivered bread without having such beam, scales and weights, and therefore he is liable. Bramwell, B., proceeds to say, "I doubt whether the appellant took out the bread in his cart 'for sale;' but, at any rate, he took it out for the purpose of delivery; and the words in the penal portion of the 7th section are 'shall at any time carry out or deliver any bread,' which must mean delivery after a previous sale, and therefore the appellant is liable to be convicted for an unlawful delivery, even although the words 'for sale' be read in after the words 'carry out.'" Mellor, J., was of the same opinion, saying "The statute seems to

(1) 1 Ex. D. 294.

me to have contemplated three occasions, upon which a customer ought to have an opportunity of weighing the bread which he buys: first, it may be sold at a shop; secondly, it may be sent sent out and sold to promiscuous customers; thirdly, it may be delivered at the house of a customer who has given a previous order." That is the case here. Denman, J., agreed in the judgment, but differed somewhat in his reasons, although not sufficiently to affect it; saying that "the words 'for sale in and from any cart or other carriage' in the 7th section were inserted in order to prevent it from extending to cases where the bread is merely in transit from one place to another, or is being taken out for charitable purposes, as, for instance, to be given to the poor, or where it is carried about for delivery in baskets without a cart." There I agree, I do not think the section would apply where there is no sale at all, and that bakers might not send a gift of bread to a friend, or to the poor, when there would be no object in ascertaining the weight, and the baker might send as much or as little as he liked. There is perhaps one distinction between *Robinson* v. *Cliff* (1) and the present case, for there the cart was drawn up at the customer's shop to get an order, and the baker went to the shop and asked how much bread was required, and, on being told, brought it from the cart in which there were no beam, scales and weights, and therefore it might be said that the cart was carrying out bread with respect to which there had been no previous bargain and sale. But the judgments do not turn on that. They extend to the case which is now before us, viz., a previous order and delivery in pursuance of it. I think *Robinson* v. *Cliff* (1) is a strong authority in support of our judgment. A passage from the treatise of Blackburn, J., was cited to us from Benjamin on Sale (2nd ed. p. 265), viz., "Where from the terms of an executory agreement to sell unspecified goods, the vendor is to *despatch* the goods, or to do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and *the property is transferred the moment the despatch or other act has commenced,* for then an appropriation is made finally and conclusively by the authority conferred in the agreement, and in Lord Coke's language, 'the certainty, and thereby

(1) 1 Ex. D. 294.

the property begins by election" (*Heyward's Case*, 2 Coke, 36). But however clearly the vendor may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, yet until the act has actually commenced, the appropriation is not final, for it is not made by the authority of the other party, nor binding on him:" 1 Blackburn on Sale, p. 128. The latter part of that passage would be authority for my judgment if the rest applied. But in my opinion the question, which is one of great nicety, as to when property passes in a sale, does not apply to this Act, which is not one for determining when the property may pass, but is an Act for the prevention of fraud, and provides that the buyer of bread may have an opportunity of detecting if the bread is not of proper weight before he actually accepts the bread delivered. I therefore do not further go into the cases on the question when property passes on a contract of sale, I read the words "for sale," in this Act as if they applied to the penalty clause, and I agree with the learned counsel for the appellant that it does apply to the case of sale and not to a gift or charity. For these reasons I am of opinion that the conviction must be affirmed.

HAWKINS, J. In the course of the argument I had much doubt, but having considered the case fully, I come to the conclusion that the conviction must be affirmed. The object of the Act was to enforce on all bakers selling bread beyond the excepted limits the sale of their bread by weight. And taking ss. 4, 6, and 7 together, the meaning clearly is that bread shall be sold by weight, and that every purchaser at the time he makes his purchase—whether at the shop, or at the cart carrying round bread for sale—shall have an opportunity of seeing for himself the bread weighed, and being satisfied that he gets the proper weight to which he is entitled. The first part of s. 7 imposes on a baker the obligation of having in his cart carrying out bread for sale a proper beam and scale with weights, and the further part provides that if any baker shall carry "or deliver" bread without such beam and scales with weights he shall be liable to a penalty. At first, it occurred to me that that meant a beam and scales in a cart carrying out bread for sale, but I think that in the latter part of the section "such beam and scales" means "proper beam and scales." Apply this section to the present case. I must say for my own part, that although the language of the judgments in *Robinson* v. *Cliff* (1) has considerable bearing, I do not think that the case itself, as regards its facts, is at all like the present. In the first place, in that case it was perfectly certain that there had been no sale or order of any specific quantity of bread before the cart drew up at the house of the customer and arrived there, although it is true that the baker had often supplied bread to that house. Having a very general order, the baker was in the habit of sending round his cart with a large quantity of bread in it, and on a particular day at the customer's house there was standing a quantity of bread, and the baker went inside the house to inquire what was wanted. There was no obligation on the customer to take any bread at all. He might have said that he wanted none. At the time the baker went in there was no contract or order whatever for any specific quantity of bread, and when he came out with an order and got the bread, there was a complete contract of sale, and it is impossible in law to come to any other conclusion but that the whole contract of sale and delivery took place either when the bread was handed out of the cart or was delivered to the customer; and it is impossible to say that that cart which took out bread to supply customers who might want it did not carry out bread "for sale," and not bread which had been sold. I should have arrived at precisely the same conclusion as that of the learned judges there, for the defendant had brought himself directly within the Act. But here the facts are somewhat different. It is said that the cart did not "carry out bread for sale," and in one sense I approve of that. It is said that the order was given when the traveller called, and he, at the request of the customer, took the order. That other goods had been ordered is immaterial. The traveller gave the order to the manager, who took from a shelf a loaf and weighed it, and put it aside in fulfilment of the order, but I think it clear that if the baker's man or the manager or the master had thought fit at any time during the day he might have disposed of that loaf to any one who came in for one. There was no obligation to send out that particular loaf—although weighed and put aside—to the customer who had ordered a quartern loaf. This may be tested by an illustration which may seem extravagant—could an action of trover or detinue have been supported if the baker had not taken the particular loaf to the customer? I think not, and I think therefore, supposing the order was given (even assuming there was a sale of *some* loaf to be thereafter appropriated) there was no sale of this particular loaf until this loaf was taken and delivered to the customer in pursuance of the previous order. The object of the statute was that the purchaser should have an opportunity of seeing the specific loaf which is to be bought—that is, the specific loaf delivered in pursuance of this order, properly weighed. I think the purchaser in this case had no such opportunity. In the first place there was only a vague order given for a loaf of bread, and it would be straining the law to say that the baker was appointed the agent of the customer to accept delivery for him. The order was merely "send me a quartern loaf," which in substance was only saying, "If you send me a quartern loaf to-morrow I will buy it," not "I will take any quartern loaf you choose to put aside for me," and I think the baker could not say, "I sold you a loaf, it is your loaf, come and fetch it or I shall charge you." There was the order for a loaf, the supply of a loaf, and no particular loaf finally and definitely appropriated to the purchaser until she accepted the loaf handed over.

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(1) 1 Ex. D. 294.

The meaning of the word "deliver" in the Act is really this: If any baker shall deliver any bread without beam and scales he shall be liable to a penalty. If a man takes out bread to deliver in pursuance of a contract of sale and delivery and does not carry beam, scales and weights he comes within the Act. Suppose the person who gave the order to the traveller had sent her servant saying, "You represent me, go to the shop and have a loaf weighed for me and set aside, and when the baker comes round let him bring it." I am far from saying that it would be necessary for the baker to send a beam and scales with that particular loaf. True, the baker might abstract some portion of the bread, and my brother Grove says that the customer has a right to have an opportunity of testing it. But I have considerable doubt of that. For if the purchaser sent her servant and said, "You see the bread weighed and set aside," and the servant did so, that would I think be a perfect contract of sale and delivery. Suppose that after seeing it weighed, the servant had told the baker to cut a notch in it, so that it might be identified, and he had done so, then, under such circumstances, the loaf having been bought, appropriated, set aside, weighed, and paid for, any transmission of it to the customer as a favour or otherwise would not be carrying it out and delivery within the meaning of the Act. But I think that if there is simply an order for two or three loaves of bread, the mere weighing out of those loaves by the baker or his man and putting them aside *intending* them to be delivered is not a delivery within the meaning of the Act. I think that the meaning of the Act is that when bread is either sold from a cart or delivered from a cart in fulfilment of a contract of sale and delivery that is the sale and delivery intended by the Act.

I do not think the consideration of the inconvenience of bakers sending out a beam and scales and weights with a single loaf ought to affect the construction of the Act, because that argument rests on the assumption that only one single loaf is sent out, whereas everybody knows that when a baker sends out his servant with bread he takes out not one loaf but many. I think that every customer has a right to an opportunity of seeing that each loaf delivered to him by the baker is of the proper weight.

Conviction affirmed.

Solicitor for appellant: *Purkis, for Sword.*

J. R.

Ex parte ARDEN. In re ARDEN.

1884
Dec. 4.

Bankruptcy—Secured Creditor—Valuation of Security—Amendment of Proof—Second Mortgagee—Notice of Appeal—Time—Notice sent by Post—Trustee—Costs—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 142; *Schedule* 2, *r.* 13—*Bankruptcy Rules,* 1883, *rr.* 112, 114 *A.*, 116 *A.* [*Rules of* 11*th of April,* 1884]—*Rules of Supreme Court,* 1883, *Order LVIII.*, *r.* 15.

If notice of a bankruptcy appeal is sent by post, as provided by s. 142 of the Bankruptcy Act, 1883, *quære* whether the notice will be in time unless the letter is received by the respondent before the expiration of the twenty-one days limited for appealing.

A mortgagee who has valued his security will in a proper case be allowed, under r. 13 in schedule 2 to the Act, to amend his valuation and proof, notwithstanding the opposition of a subsequent mortgagee.

A trustee in bankruptcy who is served with notice of an appeal, and who appears and only asks for his costs, will not be allowed his costs of appearance.

Appeal from an order of the Burslem County Court allowing the respondent H. J. Deacon to amend his proof. The bankrupt, Alwyn Hills Arden, was a brewer at Stafford. He had, in the year 1882, purchased the brewery and the stock-in-trade and goodwill of the business from H. J. Deacon for 30,000*l.*, of which sum 18,800*l.* was left on the security of a first mortgage, dated the 26th of June, 1882, of the property to Deacon. There were two other mortgages on the property, viz., a second mortgage for 400*l.* to Lloyd's Banking Company, and a third mortgage for 3700*l.* to Miss Arden, a sister of the mortgagor. In 1884 a receiving order was made against Arden in the county court on his own petition. On the 7th of April, 1884, Deacon proved in the bankruptcy for the debt due to him from Arden, valuing his security at 16,000*l.*, and claiming to prove for the balance, and he voted at the first meeting of the creditors on the footing of this proof. The trustee in the bankruptcy afterwards entered into a contract for the sale of the brewery to Messrs. Sladen & Dixon for 20,000*l.*, and this contract was confirmed at the second meeting of the creditors. On the 7th of August, 1884, Deacon applied to the Court for leave to amend his proof by increasing the valuation of his security to 18,994*l.*, on the ground that he had made his former estimate in mistake and without having a proper valuation of the property made. The judge allowed the amendment to be made, notwithstanding the opposition of the second and third mortgagees, who opposed the application on the ground that, Ex parte Arden. In re Arden.

under rule 12 (*a*) in schedule 2 to the Act, the trustee would have to redeem the property from Deacon at the larger sum, and thus a smaller balance would remain out of the purchase-money for the payment of the second and third mortgages. The trustee did not oppose the application. The order was signed by the judge on the 27th of August, 1884. The third mortgagee gave notice of appeal. The appeal was entered with the registrar of the county court on the 17th of September, and the same day a copy of the notice of appeal was sent by post to Deacon's solicitors, but was not received by them until the 18th of September.

Cooper Willis, Q.C., and *Plumptre*, for the appellant.

Bigham, Q.C., and *Boddam*, for the respondent, the first mortgagee. The notice of appeal was served too late; it was not received till after the expiration of twenty-one days from the 27th of August.

Cooper Willis, Q.C. Sect. 142 (1) of the Bankruptcy Act, 1883, allows the service of the notice by post, and if the letter is posted within the twenty-one days the service is in time.

Bigham, Q.C. An appeal is brought when the notice is served: *Ex parte Viney* (2); *Ex parte Saffery* (3). If the notice is sent by post it is not in time unless the letter is received within the twenty-one days.

Cooper Willis, Q.C. At any rate the Court has power under the rules to extend the time, and it will not allow this technical objection to stand in our way.

Mathew, J. There may be some doubt whether the service of the notice of appeal was in time, the letter not having been posted till the 17th of September. But we have power to extend the time, and, if it be necessary, I think we ought to extend it.

Cave, J., concurred.

Cooper Willis, Q.C. The order injures the third mortgagee, because the trustee will have to pay more to redeem the first mortgage, and the assets available for the other creditors will be diminished. Rule 13 in the 2nd schedule to the Bankruptcy Act, 1883, which enables a creditor who has valued his security to amend his valuation and proof "on shewing to the satisfaction of the trustee, or the Court, that the valuation and proof were made bonâ fide on a mistaken estimate, or that the security has diminished or increased in value since its previous valuation," does not apply when, besides the trustee and the creditor who has made the valuation, a third party is interested in the property. It was not intended to affect the rights of third parties.

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(1) Sect. 142. All notices and other documents for the service of which no special mode is directed, may be sent by prepaid post letter to the last known address of the person to be served therewith.

(2) 4 Ch. D. 794.

(3) 5 Ch. D. 365.

Bigham, Q.C., and *Boddam*, for the respondent, were not heard.

Mathew, J. I am of opinion that the rule applies, and that the third mortgagee has no such right as has been suggested. The first mortgagee cannot be deprived of the right which is given to him by the rule by the mere accident that there is a subsequent mortgage.

Cave, J. I am entirely of the same opinion.

Aspland, for the trustee, who had been served with notice of the appeal, asked for his costs.

Cave, J. A trustee must not come here as a merely ornamental respondent.

Solicitors for appellant: *Jennings, Son, & Burton.*

Solicitors for first mortgagee: *Ashurst, Morris, & Co., for Morgan & Co., Stafford.*

Solicitors for trustee: *Duffield & Bruty.*

W. L. C.

Ex parte BLEASE. In re BLINKHORN.

Dec. 4.

Bankruptcy—Appeal—Preliminary Objection—Notice—Costs.

A respondent to an appeal who intends to rely on a preliminary objection ought to give notice to the appellant of his intention so to do.

If he does not, and the objection is successful, the appeal will be dismissed without costs.

In re Speight (13 Q. B. D. 42) followed.

Appeal from Manchester County Court.

This was an appeal from an order made by the registrar of the

1884

Ex parte Blease. In re Blinkhorn.

Manchester County Court, dismissing a petition for a receiving order against Adam Blinkhorn. The order was made on the 27th of October, 1884, but it was not perfected until the 30th of October. The notice of appeal was dated the 20th of November, 1884, and it was not entered or served until that day.

C. A. Russell, for the appellants.

Smyly, for the respondent. The notice of appeal was served too late. The order being a simple refusal of an application, the twenty-one days allowed for appealing ran from the 27th of October, the day on which the order was pronounced, and the notice of appeal was not served till the 20th of November.

C. A. Russell, for the appellants. The respondent did not give the appellants any notice that he intended to rely on this preliminary objection; the appeal ought, therefore, at any rate to be dismissed without costs: *In re Speight.* (1)

Smyly, for the respondent. The only costs which should be disallowed are the costs of affidavits filed by the respondent after the appeal was set down: *Ex parte Fardon's Vinegar Co.* (2)

Mathew, J. I understand that the practice has been, in accordance with the decision in *In re Speight* (1), when a respondent succeeds upon a preliminary objection of which he has given no previous notice to the appellant, to dismiss the appeal without costs.

Cave, J., concurred.

Appeal dismissed without costs.

Solicitors for appellants: *Pritchard, Englefield & Co., for Crofton & Craven, Manchester.*

Solicitors for respondent: *Carter & Church, for Diggles & Ogden, Manchester.*

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(1) 13 Q. B. D. 42.

(2) 14 Ch. D. 285.

W. L. C.

[IN THE COURT OF APPEAL.]

1884
July 4.

MITCHELL *v.* DARLEY MAIN COLLIERY COMPANY.

Limitations, Statute of (21 *Jac.* 1, *c.* 16)—*Cause of Action—Recovery of Damages for Injury after Satisfaction for Previous Injury arising from same Act —Support—Action for Subsidence after Compensation for previous Subsidence.*

The plaintiff was the owner of certain land, and in 1867 and 1868, but not afterwards, the defendants worked a seam of coal lying under and near to the plaintiff's land, which subsided in consequence of the defendants' excavations. Some cottages of the plaintiff standing on his land were damaged by the subsidence and were repaired by the defendants. In 1882 a second subsidence of the plaintiff's land occurred owing to the defendants' workings in 1867 and 1868, and the plaintiff's cottages were again damaged:—

Held, that the plaintiff was entitled to maintain an action for the damage done to his cottages in 1882, and that his right to sue was not barred by the Statute of Limitations.

Nicklin v. *Williams* (10 Ex. 259), *Backhouse* v. *Bonomi* (E. B. & E. 622; 9 H. L. C. 503), *Whitehouse* v. *Fellowes* (10 C. B. (N.S.) 765) discussed.

Lamb v. *Walker* (3 Q. B. D. 389) overruled.

ACTION for damages for injuries done to three cottages and six perches of land belonging to the plaintiff.

The writ of summons was issued on the 27th of December, 1882, and the action itself came on for trial before Hawkins, J., at the Summer Assizes held at Leeds in August, 1883, and the following facts were admitted or proved:—

On or about the 11th of December, 1866, the plaintiff, by virtue of a deed of conveyance bearing date on that day, became the tenant in fee simple of six perches of land situate at Ward Green in Worsbrough, in the parish of Darfield, Yorkshire. Prior to the year 1878 six cottages had been erected thereon, and in or about that year these six cottages were pulled down, and three cottages were erected on the site of them. The defendants were the lessees of a seam of coal about nine feet in thickness under the land upon which the plaintiff's cottages stood, and under certain adjoining land: they had worked the seam during the years 1867 and 1868, but not afterwards. A subsidence owing to the defendants' workings took place in 1868 and continued until 1871, and the plaintiff's six cottages which then stood upon his land were damaged by that subsidence, and were afterwards repaired by the defendants. In 1882 a further subsidence, caused either wholly or in part by the defendants' excavations during 1867 and 1868, occurred, and thereby damage was done to the plaintiff's land and to the three cottages then standing thereon. The present action was brought to recover compensation for the damage done by the subsidence happening in 1882, and the defendants, amongst other defences, pleaded that the alleged causes of action did not arise within six years before the commencement of the action, and that the plaintiff's right to sue was barred by the Statute of Limitations.

The jury summoned to try the issues of fact having been discharged by consent, the action was reserved for further consideration, and ultimately Hawkins, J., directed judgment to be entered for the defendants. The learned judge was of opinion that *Lamb* v. *Walker* (1) was an authority in point for the present action, and felt himself bound by the decision of the majority of the Queen's Bench Division in that case.

The plaintiff appealed.

Alfred Wills, Q.C. (*C. E. Ellis* with him), for the plaintiff. In this case judgment has been given for the defendants, because the learned judge who tried the action felt himself bound by the decision of the majority of the Court in *Lamb* v. *Walker* (1); but that decision was founded upon *Nicklin* v. *Williams* (2), and the reasons for the judgment in the latter case cannot be supported since *Backhouse* v. *Bonomi.* (3) The plaintiff relies upon the maxim, Sic utere tuo ut alienum non lædas; for the defendants, by wrongfully working on their own property, have caused a mischief to the plaintiff. For the plaintiff it is contended that *Nicklin* v. *Williams* (2) ought to be overruled: it stands upon a foundation, the doctrine as to which has been overruled: it cannot be upheld if *Whitehouse* v. *Fellowes* (4) was correctly decided. The recovery of damages by action for an obstruction to light is no bar to a subsequent action for a continuance of the injury; and in that subsequent action the plaintiff, even although he is merely a reversioner, may recover substantial damages: *Shadwell* v. *Hutchinson*. (1) It is submitted that the judgment of Cockburn, C.J., in *Lamb* v. *Walker* (2) contains a correct statement of the principle of law applicable to the facts before the Court, and that the judgment of the majority of the Queen's Bench Division in that case ought not to be followed. A distinct and separate cause of action accrued to the plaintiff in 1882, and the defence of the Statute of Limitations does not apply.

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(1) 3 Q. B. D. 389.

(2) 10 Ex. 259.

(3) E. B. & E. 622; 9 H. L. C. 503.

(4) 10 C. B. (N.S.) 765.

John Forbes, Q.C. (*Pain* with him), for the defendants. Upon the facts the plaintiff cannot succeed. The real cause of action was the excavation which became wrongful when the subsidence took place; but the defendants have not worked the seams of coal since 1868 and 1869, and the right to sue accrued when the subsidence occurred in 1871. The defendants then repaired the plaintiff's cottages, and that must be taken as a satisfaction of all claims, whether existing or future, by the plaintiff against the defendants. The subsidence in 1882 was probably caused by the mining operations of other persons than the defendants. Further, the right to sue having accrued in 1871, the Statute of Limitations is a defence to the present action. *Nicklin* v. *Williams* (3) ought not to be now overruled by this Court. *Marshall* v. *Ulleswater Steam Navigation Co.* (4) is an authority to shew that when a cause of action has been litigated, a suit cannot afterwards be maintained by the same plaintiff for damages arising from the same cause of action.

[BOWEN, L.J. That was an action of trespass, it does not apply to this case.]

A. Wills, Q.C., in reply. No action lies for an infringement of the right of support until some appreciable damage has happened: *Smith* v. *Thackerah* (5); hence the plaintiff could not recover prospective damages in 1871 for the injury suffered in 1882.

BRETT, M.R. In this case the plaintiff has brought an action against the defendants for an injury to his property arising, as he alleges, from something done by the defendants on their own

(1) 2 B. & Ad. 97.
(2) 3 Q. B. D. 389.
(3) 10 Ex. 259.
(4) Law Rep. 7 Q. B. 166.
(5) Law Rep. 1 C. P. 564.

property. The plaintiff was the owner of property on the surface, and the defendants were, and are, the owners of the mines immediately under or close to the plaintiff's property. In 1868 the defendants worked out the whole of one seam of coal, said to have been a seam of about nine feet in thickness. It would seem that soon after that excavation of theirs, and by reason of it, the surface was interfered with and sank, and in consequence of that sinking some property of the plaintiff's was damaged. The plaintiff made a claim in respect of that damage to his property, and it was repaired by the defendants. That seems to me to be precisely the same as if the plaintiff had brought an action against the defendants and had recovered damages; the money would have been wanted in order to enable him to execute the repairs. It is not alleged by the plaintiff that any further damage was done to any property of his by the actual subsidence which then took place, that is, soon after 1868. If the ground had not moved any more, there would have been no further injury to his houses. The houses had been repaired, and there was an end of that. It seems clear to me that perhaps in consequence of something that was done by somebody else, and certainly not in consequence of the defendants having done anything in the meantime, but having left this excavation as it was, a subsidence took place: not the same subsidence which had done the former injury, but a new subsidence; and the plaintiff alleges—and I think it must be taken to be so—that this new subsidence has done him some appreciable injury. Accordingly he brings his action in respect of an appreciable injury caused by that new subsidence. The objection taken to him is, that he has brought this action too late. The argument is that as he has brought this action more than six years after that first subsidence which gave him a cause of action, therefore he cannot maintain it, because in an action brought at the time of the former subsidence he might have recovered damages prospectively for what has since happened to him. That is the answer of the defendants. The reply on the part of the plaintiff is this:—The fact of the defendants excavating their minerals gave him no cause of action; it did him no injury by itself; they had a right to do it; the mines were their own property, and they had a perfect right to do what they liked with their own, so long as they did not hurt him. When they excavated the minerals which were their own property, if they had then and there taken means to prevent the sinking of the plaintiff's property, he would have had no cause of action against them; what they did in excavating was perfectly lawful, if they had taken care that in so using their property they did not hurt him; but in 1868, or immediately afterwards, they did something which did give him a cause of action, that is, they caused his land to subside, and that subsidence caused by them was his cause of action; they caused that subsidence by mining, and by not propping so as to prevent the plaintiff's land subsiding afterwards. That cause of action was settled between them when they repaired his houses; but now they have done him a new and wholly independent injury: they have caused his land to subside again. It is true that in this case it is at the same spot as before, but it might have been a hundred yards off; it is a new subsidence. They have caused that subsidence by the excavation of the minerals in 1868, and by not having filled up that excavation before 1882. It is no answer to the plaintiff in respect of this new subsidence, which is the new injury to him, to tell him that the causa causans of that was the same as the causa causans of the old subsidence. That causa causans gave to the plaintiff no right of action at all in either case; but the two different results from it have given the plaintiff two causes of action, and although it is true to say that for the same cause of action successive actions for damages cannot be maintained, yet there may be any number of successive causes of action. That is the whole dispute between the parties. Therefore we must consider what is the real cause of action.

In *Backhouse* v. *Bonomi* (1) it was argued that the cause of action was the excavation, and that the subsidence was merely a damage resulting from the excavation. Upon that argument it was urged on behalf of the defendant that the action was brought too late, because it was brought more than six years after the excavation, although it was commenced within six years after the subsidence. The application of *Backhouse* v. *Bonomi* (1) depends upon a view of the facts, which was raised by a question proposed to the learned judges. That question had nothing to do with succes-

(1) 9 H. L. C. 503.

sive subsidences, the consequence of one excavation. The question put to the judges was, in effect, that if there is only one subsidence, the result of one excavation, is the Statute of Limitations to run from the time of the excavation or from the time of the subsidence, the words of the Statute of Limitations being that an action must be brought within six years after the cause of action accrued? That raises the question, what, in such a case, is the cause of action? If the excavation was the cause of action, it having been rendered wrongful by the subsequent subsidence, even in that view the wrongful act was the excavation. But the House of Lords held that the excavation was not originally a wrongful act, and because it is not originally a wrongful act, it is not made a wrongful act by something happening subsequently. An act which is right at the time when it is done, cannot be turned into a wrongful act by something that happens subsequently. Therefore it was held that the excavation was not the cause of action; it was only the cause of the cause of action, the cause of action was the subsidence and that alone; the defendant had so used his property as to make the plaintiffs' property subside, and it was the making their property subside which was the cause of action. Thereupon the Law Lords said, that the statute ran from the time when the cause of action accrued, and that was the moment of the subsidence. *Backhouse* v. *Bonomi* (1) seems to me not to have decided in direct terms the question of successive subsidences, although I think that it follows from *Backhouse* v. *Bonomi* (1), that successive subsidences, when they are independent subsidences, are independent causes of action, but as to this latter point *Backhouse* v. *Bonomi* (1) does not bind us by its authority.

Nicklin v. *Williams* (2) had occurred before *Backhouse* v. *Bonomi* (1). I do not think it was necessary in *Backhouse* v. *Bonomi* (2) for the House of Lords to determine whether *Nicklin* v. *Williams* (2) was right. I say again that the logical conclusion from *Backhouse* v. *Bonomi* (1) is to shew that *Nicklin* v. *Williams* (2) was wrong, but it was not necessary to overrule it. If *Nicklin* v. *Williams* (2) is right, we ought to give judgment in favour of the defendants because that case raised the same point as is raised now. It is true that the question in that case was raised upon

(1) 9 H. L. C. 503; E. B. & E. 622.

(2) 10 Ex. 259.

demurrer, but it was precisely the same as that now raised, because there an excavation had been made and a subsidence had happened. The defence was that the cause of action in respect of that subsidence had been satisfied. The plaintiffs pleaded as a new assignment, that they were not suing for that cause of action which had been satisfied, but for a new and different cause of action namely, a subsequent subsidence. It was argued for the defendant that the new assignment was bad, for it is only a new assignment of a damage which was the result of the former cause of action. If that had been true, the objection of the defendant would have been good. The Court of Exchequer upheld the argument for the defendant, and they decided that the new assignment was bad. Although they did not so express themselves in terms, I think their judgment must have been based on the ground that the new assignment was really a claim for more damages than had been recovered in the first action, and that the damages claimed were damages for the same cause of action. Therefore the result is that where an excavation has been left which causes one subsidence, if it is still left and causes another subsidence, then the second subsidence is a part of the damages of the first cause of action, and is not itself a new cause of action. But if the subsidence itself is the cause of action, and if the two subsidences are different and independent subsidences, although the causa causans of both is the same, it seems to me that there are two different causes of action, and then the decision in *Nicklin* v. *Williams* (1) was wrong. I have already intimated that in my view the logical conclusion from *Backhouse* v. *Bonomi* (2) shews distinctly that *Nicklin* v. *Williams* (1) was wrong. Therefore I am of opinion that *Nicklin* v. *Williams* (1) cannot be supported as good law.

Then we come to the case of *Whitehouse* v. *Fellowes* (3). That was not a mining case, but it seems to me that it raised precisely the same principle and the same kind of question. There the trustees of a turnpike road made a covered drain by the side of the highway. They made it in such a manner that it collected water in it, and that the collected water was caused to flow into

(1) 10 Ex. 259.
(2) E. B. & E. 622; 9 H. L. C. 503.
(3) 10 C. B. (N.S.) 765.

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the plaintiff's mines. The drain had been so built that it did not allow the water to go elsewhere than into the plaintiff's property. The trustees relied upon a statutory defence that they had made the drain more than three months before action; but it appeared that the plaintiff had sustained damage within three months. What is the difference between the two cases? In the one case an excavation is made in the earth by an owner in his property, the result of which is that his neighbour's property subsides. In *Whitehouse* v. *Fellowes* (1) a drain was made which the trustees had power to alter, or to take up; they made it, not in the mine owner's property but in property over which they had a power, and which therefore, as far as the mine owner was concerned was a different property from his; it injured him and gave him a cause of action; and they kept the drain without altering it. The Court of Common Pleas said the causa causans of the injury to the property was a continuing cause; but that cause alone gave to the mine owner no cause of action, it was a cause which if thereby any damage was occasioned to the mine owner's property, would immediately give him a cause of action; it had given a cause of action some time ago, but since that the trustees continued it; they might have stopped it, the continuing causa causans remained and remained in the power of the trustees, and that caused a new injury to the mine owner's property, that was a new cause of action because it was an injury to the mine owner's property in each case. It seems to me that the case of *Whitehouse* v. *Fellowes* (1) is in direct conflict in principle with the case of *Nicklin* v. *Williams* (2), and that it is impossible as a matter of principle to allow both those cases to stand together. Inasmuch as I have already expressed an opinion that *Nicklin* v. *Williams* (2) was wrongly decided, I come to the conclusion that *Whitehouse* v. *Fellowes* (1) was rightly decided, and further that *Whitehouse* v. *Fellowes* (1) is in accordance with the principles laid down in *Backhouse* v. *Bonomi.* (3)

Then I come to the case of *Lamb* v. *Walker* (4), and, to shew how difficult all this is, in the case of *Lamb* v. *Walker* (4), which was decided after the other two cases and after *Backhouse* v.

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(1) 10 C. B. (N.S.) 765.
(2) 10 Ex. 252.
(3) E. B. & E. 622; 9 H. L. C. 503.
(4) 3 Q. B. D. 389.

Bonomi (1), eminent judges of great learning were in direct conflict of view, and anything more directly in conflict than the views of the Lord Chief Justice and Manisty, J., cannot be conceived. They are just as much in conflict as the case of *Whitehouse* v. *Fellowes* (2) is in conflict with *Nicklin* v. *Williams.* (3) We have had these judgments carefully analysed before us; and I think that we must agree either with the Chief Justice or with Manisty, J., and if we agree with one of them we must disagree with the other. I cannot help thinking that the judgment of the Lord Chief Justice, which he might have founded entirely upon *Backhouse* v. *Bonomi* (1), examines the whole subject afresh, and gives the most weighty reasons to shew, that in such a case as this the only cause of action is the subsidence of the plaintiff's land, and if that subsidence has been brought about by the defendants —whether or not by the omission of something after commission, that is, without taking precautions against the consequences of an act of commission by them—each subsidence is a new cause of action. I cannot see myself any answer to the case put by the Lord Chief Justice, which is this. Where an excavation has been made, and a subsidence has taken place, it may be true that for all the effects, both existing and prospective, of that subsidence, the person injured ought to sue at once, and I incline to think that he ought. It is not necessary to determine that in this case, but I am strongly inclined to think that he ought. But what is to be done as to a new subsidence? The mine-owner has excavated in his own property; he knows that he has caused a subsidence to his neighbour's property, and he knows that that neighbour is entitled to damages for it; will he run the risk of allowing that excavation to continue, the effects of which he may obviate by immediately putting a wall or propping up his own property? There is nothing to prevent him: will he allow that to continue or will he not? If he does nothing, he is not counteracting the effects on his neighbour's property of something which he has done on his own; he is not counteracting that mischief to his neighbour by doing something on his own property; and if there is a new subsidence, that will give his neighbour a new cause of action.

(1) E. B. & E. 622; 9 H. L. C. 503. (2) 10 C. B. (N.S.) 765.
(3) 10 Ex. 259.

The Chief Justice says it is difficult to conceive that the jury, which is the tribunal that is to give damages for the first subsidence that is existing, ought to give damages for a prospective new subsidence which the defendant has the option and the right to prevent; so that, although before the verdict of the first jury is given, or although at the time that that verdict is given the mine-owner is doing that which will prevent any future damage, nevertheless the jury in the first action ought to take into consideration the prospective injury which might be thought likely to occur at the time when the action was brought. That seems to me to be a proposition which, when it is well sifted out and examined, cannot stand, and therefore the Chief Justice's reasoning, of itself, and without reference to *Backhouse* v. *Bonomi* (1), is conclusive to shew that each subsidence is a fresh cause of action. Besides that, it seems to me to be in accordance with what was decided in *Backhouse* v. *Bonomi* (1), and to be the logical result of *Backhouse* v. *Bonomi*. (1) Therefore, with great deference to my Brother Manisty, I think the judgment of the Chief Justice is to be preferred. I think that the judgment of Mellor, J., in that case was not a judgment of his own mind acting independently, but only an inquiry whether he was concluded by authority, and at that moment and at that time it may be that the case was. Therefore, I agree with the Lord Chief Justice's view that each subsidence is a new cause of action, although the causa causans of each subsidence may be the same.

It may be argued that the causa causans is not the same. The causa causans of the first is the excavation, the causa causans of the second is, as a matter of fact, the excavation unremedied, or the combination of the excavation and of its remaining unremedied. Therefore, whilst I am strongly of opinion, although it is not necessary to decide it in this case, that in respect of the same subsidence the jury ought to take into account, not only the actually existing damages caused by that subsidence, but also the prospective damages which may be the result of that subsidence, yet I think that where there is a new and further subsidence, that is a new cause of action. If that is so, the plaintiff is right in this case, and is entitled to succeed. The result of

(1) 9 H. L. C. 503.

our judgment is, that this case will be referred to some arbitrator who will have to determine the amount of damages caused by this second subsidence. What the measure of damages is in that inquiry, is not for us now to determine.

BOWEN, L.J. This is a very important question, and I should have thought it well worth while to consider the authorities and to pronounce a judgment after further time had been taken to consider them, if it were not that as a matter of fact the whole of these authorities, or a greater portion of them, have been very recently before our minds, and we are familiar with the whole of them (1), and that I myself have formed, rightly or wrongly, for better or for worse, a very distinct opinion, and I do not believe I should alter it.

The present case raises shortly the question whether the judgment of Cockburn, C.J., in *Lamb* v. *Walker* (2) is correct, or whether the judgments of Manisty and Mellor, JJ., are correct. The plaintiff was the owner of the surface. There had been a subsidence by the excavations of the defendants in 1868; that subsidence produced certain injuries which were repaired or paid for. Nothing further took place for twelve or thirteen years, when there was a further distinct subsidence in 1882 causing appreciable damage. Now what is the cause of action with respect to this subsidence which has taken place in 1882? Is it the original excavation in 1868, or is it the subsidence in 1882, or is it the combination, so to speak, of the two? The subsidence was rendered wrongful by the original act of 1868. Of course, according to the view which is to be taken of what is the cause of action, will vary the conclusion as to which is the period from which the Statute of Limitations will run. Now the law of support is a law which has not been examined at very great length till a comparatively recent date, and at the time of *Nicklin* v. *Williams* (3), the first case that has been quoted before us and which was decided in 1854, down to that comparatively recent period, the true principle on which the law of support is to be based had certainly not been arrived at. When *Nicklin* v. *Williams* (3) was decided, it was decided upon the ground that the true cause of action in the case of the subsidence of ground which ought to be supported by neighbouring ground, was the withdrawal of the support and the interference with the plaintiff's legal right to have his land, or, in the case of ancient buildings, his ancient buildings on the land, supported. It seems to me that that is really, though it may not be essential to the decision of *Nicklin* v. *Williams* (1), the view distinctly laid down by the judges who decided that case, and which entered in great part into their minds when they came to the conclusion they did. Parke, B., says he considers the action was for an injury to a right, and that there was a complete cause of action when the wrong was done and not a new cause of action when damage was sustained by reason of the original wrong; and he goes on to add that when so much of the land was taken away as to deprive the plaintiff's land of the support to which he was entitled a cause of action accrued, though no actual damage occurred by the sinking of the land or falling of the house. Finally, he distinguishes cases like *Roberts* v. *Read* (2) and *Gillon* v. *Boddington* (3) on the ground that those cases were not cases of injury to rights, which he says *Nicklin* v. *Williams* (1) was, but solely actions where damages were sought of a consequential character and the original act itself had not been a wrong at all, and had only become so by reason of those damages. It seems to follow as an easy consequence that for the original wrong the plaintiffs would be entitled in an action to recover full compensation, including the probable damage which might be done to their property in the future. I cannot help thinking that a considerable portion of the foundation of the reasoning in *Nicklin* v. *Williams* (1) is cut away when we come to the next case of *Backhouse* v. *Bonomi.* (4) There it was decided in the House of Lords, following the Exchequer Chamber, that the true character of the right of support is this: not that the person who had the land which was supported, and which demanded support from his neighbour, had an absolute right to support, the interference with which was a disturbance of property and gave a right to an action in respect of damnum, but that what he was entitled to was something different, the right to the ordinary enjoyment of his own land, and that the right to support was a right only to support so far as was necessary to enable him to enjoy his land in the ordinary way. From that it seemed to follow that until there was an interference with the enjoyment of the land there was nothing of which the plaintiff could complain, and that the original view in *Nicklin* v. *Williams* (1) was displaced to that extent. But there are two views still left open by *Backhouse* v. *Bonomi* (2) which run very close together, and I dare say they may merge into one another. It may be thought that the real cause of action when a person is deprived of support, and when his land subsides in consequence, is the interference with the enjoyment of his property which is caused by a subsidence. It may be a slightly different logical view to suppose the subsidence itself to be a sort of damage done to the plaintiff's land in consequence of the continued withdrawal (which at no moment of time could be justified,) of the support to which the land was entitled. Those are two slightly different ways of looking at the same thing, and *Backhouse* v. *Bonomi* (2) makes it somewhat difficult to say which view should be taken. I confess that I am not myself afraid to lay down this view, which is what Cockburn, C.J., adopts,—that each fresh interference with the enjoyment of property is, as it arises, a wrong done, and creates a new cause of action; that each subsidence as it is occasioned becomes as it arises a fresh interference with the enjoyment of the neighbour's property, provided it is an appreciable subsidence and is a substantial interference with the enjoyment of his property, and therefore each subsidence itself, being caused by the defendant who is the author of the wrong, creates a cause of action. I know that that may perhaps lead to a conflict of view with the case that has been cited before us of *Smith* v. *Thackerah* (3), and it might lead to this consequence, that if a substantial subsidence can be proved, the plaintiff is entitled to nominal damages quite apart from the amount of actual damage. It may be that that is so; but at all events in this case, whether that is a true view or not, it seems to me that it is enough for me to say in this case

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(1) See *Brunsden* v. *Humphrey*, post, p. 141.

(2) 3 Q. B. D. 389.

(3) 10 Ex. 259.

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(1) 10 Ex. 259.
(2) 16 East, 215.
(3) 1 Ry. & Mo. 161.
(4) 9 H. L. C. 503.

(1) 10 Ex. 259.

(2) E. B. & E. 622; 9 H. L. C. 503.

(3) Law Rep. 1 C. P. 564.

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that the subsequent subsidence is in any view a damage in itself which, united with the previous continuation of the excavation, gives a right of action. It is quite true that I can see distinctions between *Whitehouse* v. *Fellowes* (1) and the present case, nor do I go quite so far as the Master of the Rolls and say that *Whitehouse* v. *Fellowes* (1) is irreconcilable with *Nicklin* v. *Williams* (2). One reason why I say so is, that Willes, J., in the Court of Common Pleas, thought it was reconcilable with *Nicklin* v. *Williams* (2); but applying the reasoning of *Whitehouse* v. *Fellowes* (1) it seems to me that there has really been, not merely an original excavation or act done, but a continual withdrawal of support; that is to say, not merely an original act the results of which remain, but a state of things continued, and a state of things continued which has led to and caused the subsequent damage. It seems to me that as long as the defendant continued that state of things and damage arose from it, it is only right to treat the state of things as running from the time the damage was caused, because it is impossible to join the damages exclusively to the original act of excavation, and to dissever or disjoin them from the continuance of the state of things that was harmful or hurtful. In order to make that good, I should like to refer shortly to what Cockburn, C.J., says, that the inconvenience of holding the opposite is enormous, because if the original act of excavation is treated as that with which the subsequent damage is to be connected, a man will not be at liberty to correct his original misfeasance if he chooses; and if the damages are to be recovered once for all, an injustice will be done, because a man may be compelled to pay for consequences which it is possible for him at any moment to obviate. Taking a subsidence as an interference with the enjoyment of property, caused by the defendant without justification, which I think it is, and actionable in itself, or taking it as a damage, connected not merely with the original act of excavation, but with the continuing withdrawal and deprivation of support which has continued since, it seems to me in this case that the plaintiff is entitled to succeed, and is not to be defeated simply because the original excavation took place twelve years ago.

(1) 10 C. B. (N.S.) 765.

(2) 10 Ex. 259.

Fry, L.J. I am entirely of the same opinion, and I hope that I can with considerable brevity state my concurrence in the judgment of my learned Brethren.

It appears to me in the first place, with reference to authority, that we are free to decide this case upon principle, and therefore bound to do so. *Nicklin* v. *Williams* (1) is a case which has been properly pressed upon us as a binding authority, seeing that it has received the sanction of the Lord Chancellor in the House of Lords, and if it had stood alone in that way it might have been difficult for us not to feel that we were practically bound by the weight of authority; but it appears to me to be impossible to treat *Nicklin* v. *Williams* (1) as a binding authority and at the same time to carry to its logical results the principle laid down by the House of Lords in the case of *Backhouse* v. *Bonomi.* (2) Therefore we are in this position, that we must either follow the logical results of the decision of the House of Lords in that case, and in so doing discard *Nicklin* v. *Williams* (1) as a binding authority, or we must adopt *Nicklin* v. *Williams* (1) as being an authority binding on us, because it has been sanctioned by the Lord Chancellor, and refuse to follow to its logical results the principle adopted in *Backhouse* v. *Bonomi.* (2) That is, to my mind, the position of the authorities, and therefore I think we are bound to determine this question upon principle.

Now, with reference to principle, it appears to me to be plain that all damages which result from one and the same cause of action must be recovered at one and the same time, and therefore we are driven to the inquiry what is the cause of action in a case of this description. As has been pointed out by Bowen, L.J., very clearly, there are two possible ways of stating that cause of action. It may be said that the subsidence attributable to the defendants is itself an interference with the plaintiff's enjoyment of his property, and as such is the cause of action in itself, or it may be said that the cause of action is the defendants' allowing the cavity to continue without giving proper support to the superadjacent land, and the damage which follows from that circumstance to the plaintiff. To my mind it is not very material to inquire which of the two is the more accurate way of stating the

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(1) 10 Ex. 259.

(2) 9 H. L. C. 509.

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cause of action. Like Bowen, L.J., I incline to consider that the more simple and more correct mode of statement is to say that the subsidence of land attributable either to the acts or default of the defendants is itself an interference with the plaintiff's enjoyment of his own property, and as such constitutes the cause of action. But even if the other point of view may be the more just one, it appears to me that the cause of action for the second subsidence is really not the same as the cause of action for the first subsidence. Because what is the cause of action in the case of the first subsidence? I think withdrawing the stratum of coal without leaving or placing proper supports: it is really the act of omission to leave or place proper supports which gave rise to the cause of action. The mere withdrawal of the stratum of coal in itself is a perfectly legitimate and lawful act, and it is only because it is done without doing something else which would prevent the injury to the plaintiff that the cause of action arises.

One other observation I desire to make is this. It has been suggested that the excavation itself, although not wrongful at the time it was made, becomes wrongful by force of a subsidence following upon it. Now, in the first place, it appears to me, I confess, difficult to suppose that an act lawful at the time it was done becomes unlawful by the subsequent effect of that act, but it may be so. Then, if that be the true view, it would seem to follow that the excavation is wrongful only to the extent of the subsidence which has actually taken place at the time of the cause of action, and it is therefore, to my mind, exceedingly difficult to see how you can, at the time when one subsidence has taken place, recover damages, not merely for the subsidence which has made the excavation wrongful, but for a subsidence which has not occurred, and therefore which cannot have made the excavation wrongful in respect of that future subsidence. However, I do not desire to add to the observations made by my learned Brother, especially having reference to the judgment of Cockburn, C.J., in the case of *Lamb* v. *Walker*. (1) That judgment appears to me to state with great force the principle which I desire to adopt, and I will simply conclude by saying that I adopt that judgment as expressing in far better language than I can find, the view which I entertain of this case.

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(1) 3 Q. B. D. 389.

Judgment for the plaintiff.

Solicitors for plaintiff: *Ridsdale & Son, for Saunders, Nicholson, & Reeder, Wath.*

Solicitors for defendants: *S. B. Somerville, for Baxters & Co., Doncaster.*

J. E. H.

[IN THE COURT OF APPEAL.]

July 12.

BRUNSDEN *v.* HUMPHREY.

Judgment recovered—Res Judicata—Cause of Action—Separate Actions in respect of same wrongful Act—Damage to Property and Injury to Person—Damages recoverable in previous Action—Maxim, "Nemo debet bis vexari pro unâ et eâdem causâ"—Maxim, "Interest reipublicæ ut sit finis litium."

Damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person.

So *held* by Brett, M.R., and Bowen, L.J., Lord Coleridge, C.J., dissenting.

The plaintiff brought an action in a county court for damage to his cab occasioned by the negligence of the defendant's servant, and, having recovered the amount claimed, afterwards brought an action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence:—

Held, by Brett, M.R., and Bowen, L.J., Lord Coleridge, C.J., dissenting, that the action in the High Court was maintainable, and was not barred by the previous proceedings in the county court.

Judgment of the Queen's Bench Division (11 Q. B. D. 712) reversed.

APPEAL of the plaintiff against an order of the Queen's Bench Division making absolute a rule to enter judgment for the defendant. The facts are set out in the report of the proceedings before the Queen's Bench Division (1) and also are briefly noticed in the judgments of Brett, M.R., and Bowen, L.J., and it will be here sufficient to state that the plaintiff, whilst he was driving his cab, came into collision with a van of the defendant through the negligence of the defendant's servant, whereby he sustained bodily injury and his cab was damaged, and that the plaintiff, before the present action, sued the defendant for damage to his cab in a county court, and the defendant paid into court a small sum which was accepted, and thereupon the action in the county court was discontinued. Upon these facts the Queen's Bench Division entered judgment for the defendant. (1)

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(1) 11 Q. B. D. 712.

Feb. 12. *Waddy, Q.C.*, and *Crispe* for the plaintiff. The question is whether the payment into court in the action brought in the county court can be treated as an accord and satisfaction of the bodily injury sustained by the plaintiff; but it is plain that the action in the county court was brought in respect of the damage to the cab. The receipt of a sum of money as compensation for damage done is not a bar to a subsequent action, if the injury turns out to be more serious than is at first supposed: see *Lee* v. *Lancashire and Yorkshire Railway Company* (2).

[Per CURIAM. The question is not as to whether there has been an accord and satisfaction; but whether the proceedings in the county court as to the damage to the cab are a bar to the present action for the plaintiff's bodily injury.]

The proceedings in the county court were not judicial in the ordinary sense of the term: there was no argument, there was no decision. It was said by Wedderburn, S.G., during the argument in *The Duchess of Kingston's Case* (3): "A sentence is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled: in order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defence, a real decision." And this passage is cited with approval by Lord Brougham in *Earl of Bandon* v. *Becher* (4). The doctrine above stated applies to the present facts; for in the county court there was no "judicial determination" of the rights of the parties. But at all events the proceedings in the county court are not a bar to the present action, for the plaintiff then sued for a different cause of action. For the defendant reliance may be placed upon the maxim: "Nemo debet bis vexari pro unâ et eâdem causâ;" but it has no application here.

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(1) 11 Q. B. D. 712.

(2) Law Rep. 6 Ch. 527.

(3) 20 Howell's State Trials, 478, 479.

(4) 3 Cl. & F. 479, at pp. 510, 511.

Fetter v. *Beale* (1) is distinguishable: in that case both actions were in respect of bodily injury. It was said by Lord Kenyon, C.J., in *Greathead* v. *Bromley* (2), that "if an action be brought and the merits of the question discussed between the parties, and a final judgment obtained by either, the parties are concluded and cannot canvass the same question again in another action." The proposition here stated is, no doubt, quite correct; but it has no application to the present case; for no "final judgment" was pronounced in the county court upon the question discussed in the present action. No evidence was in point of fact adduced in the county court as to the plaintiff's bodily injuries; and therefore he may in the present action recover damages in respect of them: *Markham* v. *Middleton* (3); *Seddon* v. *Tutop* (4). But, further, no evidence could in the county court be lawfully given as to the plaintiff's bodily injuries: for he merely sued for the damage done to his cab and for no other ground of complaint; and this is a decisive test to shew that the present action is maintainable: *Hitchin* v. *Campbell* (5). The plaintiff has not acted oppressively in bringing two actions; moreover, the High Court of Justice can always interfere summarily to stay an abuse of its process.

Murphy, Q.C., and *J. C. Hannen*, for the defendant. The present action will not lie. The cause of action is the same as that litigated in the county court, and the plaintiff had the opportunity of recovering by the action in that court the damages which he now claims; and therefore the recovery of damages in the county court is a bar to the present action: *Nelson* v. *Couch* (6). The negligence of the defendant's servant is the gist of the action, and the plaintiff is endeavouring to turn one cause of action into two. When compensation has been accepted for an actionable wrong, the person injured is barred from maintaining any further action in respect of it: *Wright* v. *London General Omnibus Company* (7). The decision in that case strongly supports the argument for the defendant. *Barnett* v. *Lucas* (8) was really a case where two distinct causes of action arose out of one wrongful act. The decisions as to the right to maintain several actions for successive subsidences of the surface of land owing to excavations underground, throw light upon the principles of law applicable to the present case; and it was held by a majority of the Queen's Bench Division in *Lamb* v. *Walker* (1) that only one action can be maintained for both present and future damage to the surface of land through the withdrawal of lateral support. *Nicklin* v. *Williams* (2) was in one view overruled by the House of Lords in *Backhouse* v. *Bonomi* (3); but it may be upheld on the ground assigned by Willes, J., when the last-named case was before the Exchequer Chamber (4), namely, that no fresh or second action can be maintained in respect of subsequently accruing damage, when it arises from an excavation causing previous damage in respect of which satisfaction has been already obtained; in this point of view *Nicklin* v. *Williams* (2) is a strong authority for the defendant.

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(1) 1 Ld. Raym. 339, 692.

(2) 7 T. R. 455, at p. 456.

(3) 2 Str. 1259.

(4) 6 T. R. 607.

(5) 2 W. Bl. 827, at p. 831.

(6) 15 C. B. (N.S.) 99, at pp. 108, 109.

(7) 2 Q. B. D. 271.

(8) Ir. R. 6 C. L. 247.

Waddy, Q.C., in reply.

Cur. adv. vult.

July 12. The following judgments were delivered:—

BRETT, M.R. This case was heard before Pollock, B., and Lopes, J. The plaintiff was a cabman driving in his vehicle, when he was run into by the defendant's vehicle. The collision was caused by the negligence of the defendant's servant. In the case in which the present appeal is brought, the plaintiff has sued the defendant for injury done to his person. The jury have found a verdict for £350, shewing clearly that the personal injuries were serious. Before this the plaintiff had brought an action in the county court for damage to his cab, by which he recovered a certain amount. In this second action it was urged that the plaintiff could not succeed, because no person can sue twice for one and the same cause of action. On the other side it was contended that there were two distinct causes of action, and that there was no law to prevent two actions: that it might be sometimes oppressive to bring two actions, but that in that event the Court might summarily stay one of them, and that in the present case the two actions were not oppressive. The question is whether there are two causes of action, or whether there is only one; and if there is but one cause of action, the present suit is not maintainable. For the defendant, reliance has in effect been placed upon the maxim, Interest reipublicæ ut sit finis litium; and it has been contended that it enunciates an admirable rule of law. When that rule is applied to damages which are patent, it is a good rule; but where damages are afterwards developed, it is not a rule to be commended. It is a rule which sometimes produces a harsh result, and if it were now for the first time put forward, I could not assent to its being pushed to the length to which it has sometimes been carried: in fact it is never wanted except when injury, undeveloped at the time of action brought, is afterwards developed. However, the maxim exists, and it must receive a proper application. But, in order to apply it, we must often suppose what is not the case. It is to be assumed that the subsequent damage was in the contemplation of the person injured. The question, however, remains whether the cause of action is the same. In this case the injury was occasioned by the negligent driving of the defendant's servant. Suppose that by the negligent driving of the defendant's servant the van had run against the plaintiff's cab, and had injured him without doing any damage to the cab: an action would have lain, and any apparent bodily injury which the plaintiff might have sustained would be a cause of action. Suppose that the defendant's servant by his negligent driving had damaged the plaintiff's cab without injuring him personally: under circumstances of that kind the cause of action would be a damage to the plaintiff's property. The owner of property has a right to have it kept free from damage. The plaintiff has brought the present action on the ground that he has been injured in his person. He has the right to be unmolested in all his bodily powers. The collision with the defendant's van did not give rise to only one cause of action: the plaintiff sustained bodily injuries, he was injured in a distinct right, and he became entitled to sue for a cause of action distinct from the cause of action in respect of the damage to his goods: therefore the plaintiff is at liberty to maintain the present action. Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to a subsequent action.

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(1) 3 Q. B. D. 389.

(2) 10 Ex. 259.

(3) 9 H. L. C. 503.

(4) E. B. & E. 658.

I do not decide this case on the ground of any test which may be considered applicable to it; but I may mention one of them; it is whether the same sort of evidence would prove the plaintiff's case in the two actions. Apply that test to the present case. In the action brought in the county court, in order to support the plaintiff's case, it would be necessary to give evidence of the damage done to the plaintiff's vehicle. In the present action it would be necessary to give evidence of the bodily injury occasioned to the plaintiff, and of the sufferings which he has undergone, and for this purpose to call medical witnesses. This one test shews that the causes of action as to the damage done to the plaintiff's cab, and as to the injury occasioned to the plaintiff's person, are distinct. Therefore we are not now called upon to apply a legal maxim, the application of which ought not to be stretched. The plaintiff is entitled to recover the sum of £350, awarded by the jury. Two actions may be brought in respect of the same facts, where those facts give rise to two distinct causes of action.

BOWEN, L.J. The plaintiff in this case has recovered a verdict and 350*l.* damages for personal injuries sustained by him through the negligence of the defendant's servant in driving a van, which had come into collision with the plaintiff's cab, thrown the plaintiff from his box and seriously injured him in his legs. Previously to bringing the action the plaintiff had sued the defendant in the county court for damages done to his cab in the collision, and the particulars delivered under his plaint had been confined to the damages which the cab had sustained. The defendant in the county court action paid 4*l.* 3*s.* into court together with 6*s.* costs, upon which the plaintiff had discontinued the county court plaint. The present action was now brought in the High Court for personal injuries, of the importance and extent of which the plaintiff alleged that he had been ignorant at the time of the county court proceedings. On a motion for a new trial the Court below have entered a judgment for the defendant on the ground that the recovery of damages in respect of the cab in the county court is a bar to any further action for injury to the plaintiff's person. The rule of the ancient common law is that where one is barred in any action real or personal by judgment, demurrer,

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confession or verdict, he is barred as to that or the like action of the like nature for the same thing for ever. "It has been well said," (says Lord Coke in a note to *Ferrer's Case* (1)), "interest republicae ut sit finis litium, otherwise" says Lord Coke, "great oppression might be done under colour and pretence of law:" (see also *Sparry's Case* (2); *Higgens's Case* (3); Year Book, 12 Edward IV., p. 13, 10.) Accordingly in *Hudson* v. *Lee* (4) it was held to be a good plea in bar to an appeal of maihem, that the appellant had recovered damages in an action for trespass brought for the same assault, battery, and wounding. So in *Bird* v. *Randall* (5) it was decided to be an answer to an action for seducing a man's servant from his service, that penalties had previously been recovered by the master in satisfaction of the injury done him. So too in *Phillips* v. *Berryman* (6) a recovery in replevin was held to be a good bar to an action on the statute of Marlbridge for an excessive distress, on the ground that the plaintiff had already had his remedy, and that a recovery in one personal action is a bar to all other personal actions on the same subject. The principle is frequently stated in the form of another legal proverb, Nemo debet bis vexari pro eâdem causâ. It is a well settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. The difficulty in each instance arises upon the application of this rule, how far is the cause which is being litigated afresh the same cause in substance with that which has been the subject of the previous suit. "The principal consideration," says De Grey, C.J., in *Kitchen* v. *Campbell* (7), "is whether it be precisely the same cause of action in both, appearing by proper averments in a plea, or by proper facts stated in a special verdict, or a special case." "And one great criterion," he adds, "of this identity is that the same evidence will maintain both actions." See per Lord Eldon in *Martin* v. *Kennedy* (8). "The question," says Grose, J., in *Seddon* v. *Tutop* (9), "is not whether the sum demanded *might have been* recovered in the former action, the only enquiry is whether the same cause of action *has been* litigated and *considered* in the former action." Accordingly "though a declaration contain counts under which the plaintiff's whole claim might have been recovered, yet if no attempt was made to give evidence upon some of the claims, they might be recovered in another action:" *Thorpe* v. *Cooper* (1). It is evident therefore that the application of the rule depends, not upon any technical consideration of the identity of forms of action, but upon matter of substance.

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(1) 6 Coke, 9 a.

(2) 5 Coke, 61 a.

(3) 6 Coke, 45 a.

(4) 4 Coke, 43 a.

(5) 3 Burr. 1345.

(6) 3 Doug. 287.

(7) 2 W. Bl. 827.

(8) 2 B. & P. 71.

(9) 6 T. R. 607.

I have now to consider the application of the above doctrine to the case of the present action: and the question to be decided is whether the damage done by the negligent driving of the defendant's servant to the plaintiff's cab is in substance the same cause of action as the damage caused by such negligence to the plaintiff's person. Nobody can doubt that if the plaintiff had recovered any damages for injuries to his person, he could not have maintained a further action for fresh bodily injuries caused by the same act of negligence, merely because they had been discovered or developed subsequently, see *Fetter* v. *Beale* (2). "The jury," says the Court in that case, "have in the former action considered the nature of the wound and given damages for all the damage that it had done to the plaintiff." This authority however leaves still open the point I now have to determine, whether the cause of action arising from damage to the plaintiff's cab is in substance identical with that which accrues in consequence of the damage caused to his person. In order clearly to elucidate this question, let me assume for the sake of argument that the damage had been caused by some act of the defendant himself and not merely an act of his servant. According to the old distinctions of forms of actions which still have a historical value as throwing light upon the principles and definitions of the common law, the form of action upon such an hypothesis would have been trespass to the person for the personal injury, trespass to goods for the damage to the vehicle. Injury would have been done to the plaintiff in respect of two absolute and independent rights, the distinction between which is inveterate both in the English and the Roman law. Everyone in this country has an absolute right to security for his person. Everybody has further an absolute right

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(1) 5 Bing. 129.

(2) 1 Ld. Raym. 339.

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to have his enjoyment of his goods and chattels unmeddled with by others. In the hypothetical case I am assuming both these rights would have been injured, and though the two injuries might have been combined in one suit, could it have been said that the subject matter of each grievance was the same? Applying the test of identity furnished by De Grey, C.J., in *Kitchen* v. *Campbell* (1), the first matter that is obvious is, that the same evidence would not have supported an action for trespass to the person and an action for the trespass to the goods. In the one case the identity of the man injured and the character of his injuries would be in issue, and justifications might conceivably be pleaded as to the assault, which would have nothing to do with the damage done to the goods and chattels. In the other case the plaintiff's title to the goods might have been in issue in addition to the question of the damage done to them. Different provisions of the Statute of Limitations might possibly have applied in each case. And finally, the damage in one case might have been directly due to the wrongful act complained of, in the other case it might not. There is no authority so far as I know in the books for the proposition, that a recovery in an action for a trespass to the person would be a bar to the maintenance of an action for a trespass to goods committed at the same time. In the present instance, as the defendant himself was not driving but his servant, trespass would not have lain under the old law, and the plaintiff's remedy would have been in an action on the case for negligence, based on the negligent management by the servant of his master's horses, a negligence for which in the eye of the law the master or employer is responsible. Now what is the gist of such an action on the case for negligence? If the whole of the plaintiff's case were to be stated and the entire story told, it seems to me that it would have comprised two separate or distinct grievances, narrated, it is true, in one statement or case. Actions for the negligent management of any animal, or any personal or moveable chattel, such as a ship or machine, or instrument, all are based upon the same principle, viz., that a person, who, contrary to his duty, conducts himself negligently in the management of that which contains in itself an element of danger to others,

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(1) 2 W. Bl. 827.

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is liable for all injury caused by his want of care or skill. Such an action is based upon the union of the negligence and the injuries caused thereby, which in such an instance will as a rule involve and have been accompanied by specific damage. Without remounting to the Roman law, or discussing the refinements of scholastic jurisprudence and the various uses that have been made, either by judges or juridical writers, of the terms "injuria" and "damnum," it is sufficient to say that the gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. In a certain class of cases the mere violation of a legal right imports a damage. "Actual perceptible damage," says Parke, B., in *Embrey* v. *Owen* (1) "is not indispensable, as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage." But this principle is not as a rule applicable to actions for negligence: which are not brought to establish a bare right, but to recover compensation for substantial injury. "Generally speaking," says Littledale, J., in *Williams* v. *Morland* (2) "there must be temporal loss or damage accruing from the wrongful act of another in order to entitle a party to maintain an action on the case:" see *Fay* v. *Prentice* (3), per Maule, J.

This leads me to consider whether, in the case of an accident caused by negligent driving, in which both the goods and the person of the plaintiff are injured, there is one cause of action only or two causes of action which are severable and distinct. This is a very difficult question to answer, and I feel great doubt and hesitation in differing from the judgment of the Court below and from the great authority of the present Chief Justice of England. According to the popular use of language, the defendant's servant has done one act and one only, the driving of the one vehicle negligently against the other. But the rule of law, which I am discussing, is not framed with reference to some popular expressions of the sort, but for the sake of preventing an abuse of substantial justice. Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff, was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damage which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in *one* sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act of driving, which (if no damage had ensued) would have been legally unimportant. It certainly would appear unsatisfactory to hold that the damage done in a carriage accident to a man's portmanteau was the same injury as the damage done to his spine, or that an action under Lord Campbell's Act by the widow and children of a person who has been killed in a railway collision, is barred by proof that the deceased recovered in his lifetime for the damage done to his luggage. It may be said that it would be convenient to force persons to sue for all their grievances at once and not to split their demands; but there is no positive law (except so far as the County Court Acts have from a very early date dealt with the matter,) against splitting demands which are essentially separable (see *Seddon* v. *Tutop* (1)), although the High Court has inherent power to prevent vexation or oppression, and by staying proceedings or by apportioning the costs, would have always ample means of preventing any injustice arising out of the reckless use of legal procedure. In the present case the plaintiff's particulars in the county court were confined to the damage done to his cab; the injury to his person, therefore, was neither litigated nor considered in the county court. The real test is not, I think, whether the plaintiff had the opportunity of recovering in the first action what he claims to recover in the second (see *Seddon* v. *Tutop*. (1)) With all respect, I do not see how it can be said that *Nelson* v. *Couch* (2) so decides. That case establishes only the converse rule, viz., that the maxim "Nemo debet bis vexari" cannot apply where in the first action the plaintiff had no such opportunity of satisfying his claim. The language of Coleridge, J., and the other members of the Court in *Hodsoll* v.

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(1) 6 Ex. 353, at 368.

(2) 2 B. & C. 916.

(3) 1 C. B. 835.

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(1) 6 T. R. 607.

(2) 15 C. B. (N.S.) 99.

Stallebrass (1) must, I think, be read by the light of the special circumstances of that case; and so read is not inconsistent with the view at which I have here arrived. I am in no way departing from the language of this authority in holding, as I do in the present instance, that the damage, for which the plaintiff is now suing, accrues from a different injury, and therefore a different wrong, from that for which he recovered damages in the county court. The view at which I have arrived, is in conformity with the reasoning of the judgment recently pronounced by this Court in the case of *Mitchell* v. *Darley Main Colliery Co.* (2), where it was held, reversing *Lamb* v. *Walker* (3), that each fresh subsidence of soil in the case of withdrawal of support gave rise to a fresh cause of action. Nor do I feel called upon to extend the application of the sound and valuable principle of law, that none shall be vexed twice for the same cause of action, to a case to which it has never yet been applied, and to which it can only be applied by pursuing analogy to lengths which would involve practical injustice. The present case is one in which I am conscious that lawyers of great authority do differ and will differ. But on the whole, in my opinion, the judgment of the Queen's Bench Division ought to be reversed, and the judgment entered at the trial for the plaintiff be restored with costs to the plaintiff, including the costs below and of this appeal.

LORD COLERIDGE, C.J. (4) In this case I am with much regret unable to concur in the judgment of my Brother Bowen, to which I understand the Master of the Rolls to assent. I should have been glad in the face of this difference of opinion to have given reasons at length for my inability to agree in the judgment. But the plaintiff very naturally presses for judgment, and I am unable to do more than shortly to express my dissent. It appears to me that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the technical cause of action, equally the cause is one and the same: that the injury done to the plaintiff is injury done to him at one and the same moment

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(1) 11 A. & E. 305.

(2) Ante, p. 125.

(3) 3 Q. B. D. 389.

(4) The judgment of Lord Coleridge, C.J., was read by Bowen, L.J.

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by one and the same act in respect of different *rights*, i.e. his person and his goods, I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured his trousers which contain his leg, and his coat-sleeve which contains his arm, have been torn. The consequences of holding this are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it. I think that the Court below was right, and that this appeal should be dismissed.

Judgment reversed.

Solicitors for plaintiff: *Noon & Clarke.*
Solicitors for defendant: *Arkcoll & Cockell.*

J. E. H.

[CROWN CASE RESERVED.]

THE QUEEN *v.* COX AND RAILTON.

April 5; *Nov.* 20.

Evidence—Solicitor and Client, Communications between—Privileged Communication—Communication in furtherance of Criminal Purpose—Criminal Law.

All communications between a solicitor and his client are not privileged from disclosure, but only those passing between them in professional confidence and in the legitimate course of professional employment of the solicitor. Communications made to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure.

C. and R. were partners under a deed of partnership. M. brought an action against R. & Co., and obtained judgment therein, and issued execution against the goods of R. The goods seized in execution were then claimed by C. as his absolute property under a bill of sale executed in his favour by R. at a date subsequent to the above-mentioned judgment. An interpleader issue was ordered to determine the validity of the bill of sale, and upon the trial of this issue, the partnership deed was produced on C.'s behalf, bearing an indorsement purporting to be a memorandum of dissolution of the said partnership, prior to the commencement of the action by M. Subsequently C. and R. were tried and convicted upon a charge of conspiring to defraud M., and upon that trial the case for the prosecution was, that the bill of sale was fraudulent, that the partnership between R. and C. was in truth subsisting when it was given, and that the memorandum of dissolution indorsed on the deed was put there after M. had obtained judgment, and fraudulently ante-dated, the whole transaction being, it was alleged, a fraud intended to cheat M. of the fruits of his execution. Upon the trial a solicitor was called on behalf of the prosecution to prove that after M. had obtained the judgment C. and R. together consulted him as to how they could defeat M.'s judgment, and as to whether a bill of sale could legally be executed by R. in favour of C. so as to defeat such judgment, and that no suggestion was then made of any dissolution of partnership having taken place. The reception of this evidence being objected to, on the ground that the communication was one between solicitor and client, and privileged, the evidence was received, but the question of whether it was properly received was reserved for this Court:—

Held, by the Court (Grove, J., Pollock and Huddleston, BB., Hawkins, Lopes, Stephen, Watkin Williams, Mathew, Day, and Smith, JJ.), that the evidence was properly received.

Cromack v. *Heathcote* (2 B. & B. 4); *Rex* v. *Smith* (1 Phil. & Arn. on Evidence, 118); and *Doe* v. *Harris* (5 C. & P. 592) overruled.

Follett v. *Jefferyes* (1 Sim. (N.S.) 1); *Russell* v. *Jackson* (9 Hare, 387); and *Gartside* v. *Outram* (26 L. J. (Ch.) 113) approved.

THE following case was stated by Sir Thomas Chambers, Recorder of London.

"At the February sessions of the Central Criminal Court, Richard Cobden Cox and Richard Johnson Railton were tried before me on an indictment then preferred against them. The indictment was objected to on behalf of the defendants, on the following grounds, viz:—Count 1, which is framed upon ss. 1 and 2 of 13 Eliz. c. 5, on the ground that the acts alleged therein do not constitute an offence under that statute, and that therefore as no conspiracy is alleged in that count, no offence is charged. It was further objected that the count was bad in charging the defendants with unlawfully and fraudulently obstructing and perverting the provisions of the Act, and not with disobeying them. Count 2, which is framed under s. 3 of the said statute, was also objected to on the ground that the acts alleged therein do not constitute an offence for which a single person can be indicted, and that as no conspiracy is alleged therein no offence was charged in that count. Count 3, which charges a conspiracy to commit the acts alleged in the 1st and 2nd counts was objected to on the ground that it does not contain any allegation of an intent to defraud. Counts 4, 5, and 6, were objected to on the

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ground that as they charge a conspiracy to commit an act which is not in itself illegal, it is necessary to set out in each of these counts overt acts which shew the means by which the conspiracy was effected.

"The facts of the case, so far as they are pertinent to this case, were as follows: In February, 1882, an action was brought by Henry Munster against R. J. Railton & Co., the publishers of a newspaper called the *Brightonian*, for libel, and an appearance was entered to that action by the defendant Richard Johnson Railton alone. That action resulted on the 24th of June, 1882, in a verdict and judgment for the plaintiff by consent for 40*s.* and costs as between solicitor and client. The costs were on the 18th of August, 1882, taxed at 489*l.* 4*s.* 11*d.*, and on the 20th of August execution was issued against the defendant Railton for the amount of the judgment. The sheriff, upon going into possession of the household goods and stock-in-trade at the premises where the newspaper was carried on, was met by a duly executed and attested bill of sale of such goods and stock, and of the copyright of the *Brightonian*, from Railton to the other defendant, Richard Cobden Cox, dated the 12th of August, 1882, and registered the 19th of August, 1882, and the sheriff thereupon withdrew from possession. An interpleader issue was afterwards directed to be tried with reference to this bill of sale, and upon the trial of that issue on the 15th of January, 1883, a deed between the defendants Cox and Railton, dated the 9th of April, 1881, was produced, by which they agreed to become partners in the business of newspaper proprietors for the term of twenty-one years, determinable in certain events at the end of three years on giving six months' notice. That deed had indorsed on it a memorandum of dissolution signed by the two defendants, purporting to have been signed on the 3rd of January, 1882. The case for the prosecution was that the bill of sale was a fraudulent bill of sale of the partnership assets entered into between Railton and Cox, whilst they were partners, for the purpose of depriving Henry Munster of the fruits of his judgment, and as evidence of fraud they proposed to prove that the memorandum of dissolution of the partnership, although dated on the 3rd of January, 1882, was not, in fact, executed until after Henry Munster had obtained the judgment against Railton, and for this purpose they called Mr. Goodman, a solicitor who had acted for both Cox and Railton in the preparation of the deed of partnership, to prove a conversation he had with the two defendants on the 28th of June, 1882, at his office, when they called to consult him professionally four days after the trial of the action against Railton. This evidence was objected to on behalf of the defendants on the ground that it was a privileged communication, and the case of *Cromack* v. *Heathcote* (1) was cited.

"Counsel for the prosecution contended that the conversation took place for the purpose of fraud, and referred to a printed copy of the shorthand writer's notes of the case of *Reg.* v. *Castro.* I admitted the evidence, which was to the following effect:—

"'On the 28th of June, or thereabouts, Railton and Cox came to me. Railton said, "I suppose you have heard the result of the Munster case." I said, "Yes." He said, "Can anything be done to prevent the property being seized under an execution?" I said, "Only a sale to a bonâ fide purchaser." He said, "Could the property be sold and I remain in possession as manager?" I said, "No, you must go out of possession." He said, "That won't do. Can I give a bill of sale to Mr. Cox?" I said, "No, you cannot, because of the partnership." Railton said, "Does anyone know of the partnership except you and ourselves?" I said, "No, not that I am aware of, only my clerks." Cox said, "Then you don't think a bill of sale will do?" I said, "Certainly not." They then asked my fee and paid it, and left the office. Nothing was said about a dissolution at that interview. The interview was with me as a solicitor, and I was paid my fee. It was expressly arranged that the partnership should be kept secret. Nothing either way was said about a dissolution.' The defendants were found guilty on all the counts of the indictment. I considered the evidence of Mr. Goodman had a material effect in inducing the jury to arrive at that verdict. I reserved judgment, and admitted the defendants to bail until this case shall have been decided by the Court for Crown Cases Reserved.

"The questions for the Court are:—(1.) Whether the evidence of Mr. Goodman was properly admitted. (2.) Whether the indictment charged an offence against the defendants in all or any of the counts. If either of these questions is answered in the negative the conviction is to be quashed: if both are answered in the affirmative it is to be affirmed, and the verdict should be entered on such of the counts of the indictment as sufficiently charge an offence."

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(1) 2 B. & B. 4.

1884, April 5. The judges present were Lord Coleridge, C.J., Hawkins, Stephen, Watkin Williams, and Mathew, JJ.

E. Clarke, Q.C. (*Gore* and *Gill*, with him), for the defendants. Mr. Goodman was formerly the defendants' solicitor, and he was called upon this trial by the prosecution and examined as to what had passed between himself and his clients when they went to consult him professionally, and that without any proof of any fraud having been then intended, or since committed by the defendants. Such communications, if not absolutely privileged from disclosure, must at least be primâ facie privileged, so that the evidence should not have been admitted without some reasonable foundation having first been laid by evidence to destroy the presumption of privilege. By *Greenough* v. *Gaskell* (1) it was established that the privilege was not confined to communications made in the course of litigation. In *Rex* v. *Smith* (2), Holroyd, J., refused to order an attorney to produce a forged note which had been entrusted to him professionally by his client, the alleged forger, for the purposes of the trial of his client for the forgery. His view was that a solicitor ought not to produce it against his client. It is true that in *Reg* v. *Avery* (3) this case is rather questioned, but it is afterwards, in *Reg* v. *Tylney* (4), quoted as an authority.

[LORD COLERIDGE, C.J. This case resembles *Cromack* v. *Heathcote* (5), it may be we shall have to consider whether that case is law.]

That case is approved of, and followed, in subsequent cases.

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(1) 1 My. & K. 98; Roscoe's Dig. of Evidence in Crim. Cases. 10th ed. pp. 154–157.

(2) 1 Phillips and Arnold on Evidence, p. 118.

(3) 8 C. & P. 596.

(4) 18 L. J. (M.C.) 36; 1 Den. C. C. 319.

(5) 2 B. & B. 4.

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[WATKIN WILLIAMS, J. If a robber consults a skilled lawyer how to rob with impunity, can such a consultation be privileged?]

That would not be a consulting a solicitor professionally, but before the solicitor could be examined evidence should be required to shew that it was not a professional consultation, evidence ab extra. The foundation of the rule as to privilege is the necessity for allowing communications with professional advisers to be perfectly free and truthful, unfettered by any fear of consequences.

[LORD COLERIDGE, C.J. We fully recognise the importance of this case, and feel the necessity of protecting all legitimate communications between clients and their legal advisers, and as the cases are not altogether consistent we think this case should be argued before a full Court, so that an authoritative rule may be laid down.]

1884. June 21, 27. The judges present were Grove, J., Pollock and Huddleston, BB., Lopes, Hawkins, Stephen, Watkin Williams, Mathew, Day, and Smith, JJ.

E. Clarke, Q.C., for the defendants, continued his argument. The rule is clearly laid down that what passes between solicitor and client in professional confidence is privileged from disclosure. The clients here consulted the solicitor professionally, paying him a fee for his advice. In Phil. on Evidence, p. 105, the rule now contended for is stated, "an attorney will not be allowed against his client's will to disclose matters of professional confidence, though himself willing to do so," and reasons, which the defendants adopt as their argument, are there given. The case of *Cromack* v. *Heathcote* (1) fully bears out this view, and the point on which it was desired, in violation of professional confidence, to call the attorney, was similar to the point with regard to which Goodman was called in this case, it was to prove he refused to draw an assignment because it would be a fraud, which some one else afterwards did draw for his client. Dallas, C.J., rightly applies the test, was the attorney consulted professionally, and holds that he was. Borrough, J., says it would be most mischievous if it were once doubted whether or no such a communication were privileged, and Richardson, J., takes a similar view.

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(1) 2 B. & B. 4.

[HUDDLESTON, B. Taddy, Serjeant, does not raise the point raised here, does he?]

No; it does not seem to have been even thought open to doubt that if the solicitor was employed in the regular course all that passed would be privileged. The next case, *Rex* v. *Haydn* (1), contains an important judgment of Bushe, C.J. The accused consulted an attorney as to whether a certain document could safely, having regard to the law of libel, be published by him, the attorney declined to say what the document shewn to him was, relying upon the ground of privilege. The Chief Justice says: "If any man should confide to a professional person that he had a treasonable or felonious intention, and wished to know how he might execute it so as to escape punishment, it would be too much to say that such communication was privileged; but if a man meditates an act which, exceeding certain limits, would become criminal, and confined within certain bounds would be perfectly justifiable, the person asking the advice must be considered as seeking how he may avoid and not how he may commit a crime, and it is impossible that an attorney should be obliged to disclose such communication . . . . it cannot be said to amount to the meditation of a crime if a man adopts a course by which he seeks to avoid the commission of one."

[POLLOCK, B. Is it possible to contend that if the client's object is to see how to commit a crime there can be privilege.]

There is no privilege if the solicitor is a party to the crime, a co-conspirator, but it may be otherwise if the solicitor is an innocent party. In Stephen's Digest it is said, after stating the rule, that the rule does not extend to communications made in furtherance of any criminal purpose. (2) If the attorney is innocent he is acting professionally, whilst if a party to the crime he could not be.

[GROVE, J. The privilege is the client's, as has often been said, not the solicitor's, so it would seem reasonable to say the criminal motive or purpose in the client would destroy it.]

It is not in this case necessary to do more than suggest that

(1) 2 Fox & Smith, 379. (2) Steph. Dig. of the Law of Evidence, p. 114.

whilst it is clear the privilege cannot exist where the solicitor is helping in a crime, it is, on the cases, not so clear where the client only is guilty of any criminal intention, the point however is not vital to the defence. Again, in *Rex* v. *Haydn* (1), Bushe, C.J., cites with approval *Cromack* v. *Heathcote* (2), and treats it, as it was, as decisive of the case before him. *Greenough* v. *Gaskill* (3), decided later, is a case of great authority, the rule is there laid down in the widest terms, and the reason given for it is the absolute necessity for allowing professional advice to be safely taken, and the exception that the rule does not apply where the solicitor is a party to the fraud or crime is also laid down in precise terms. Again, *Cromack* v. *Heathcote* (2) is not doubted, on the contrary it appears to be approved. Soon after was the case of *Doe* v. *Harris* (4), in which Talfourd, Serjeant, takes the point that no privilege attaches where there is a fraud intended, but Parke, J., there says "the protection applies in all cases in which the relation of attorney and client subsists," and he does not allow the attorney to be asked if he was consulted for a lawful or unlawful purpose. Later, in *Pearse* v. *Pearse* (5), the wide view of the privilege is again taken, and the reason for it put most strongly by Knight Bruce, V.-C. *Follett* v. *Jefferyes* (6) is important, inasmuch as, while approving the rule, it points out that if the solicitor is a party assisting in the fraud the privilege is gone, and that again is pointed out in *Charlton* v. *Coombes.* (7) In *Rex* v. *Smith* (8) there is an example of a case of fraud and criminal intention in the client and of a solicitor no party to it.

[STEPHEN, J. It does not appear that in the absence of the note there was any evidence of crime, any evidence of forgery.]

No; and consequently no foundation for saying the privilege was destroyed which primâ facie existed. In *Reg.* v. *Avery* (9) this case of *Rex* v. *Smith* (8) was questioned by Patteson, J., who later, in *Reg.* v. *Tylney* (1), withdraws his former opinion. In *Reg.* v. *Hayward* (2) it seems that the Court held that the forged will was not entrusted to the attorney in professional confidence, and therefore that he properly produced it and gave evidence. In *Reg.* v. *Farley* (3) the decision went on the ground that the witness was not consulted as a solicitor, but was only acting as a money-lender. The case of *Reg.* v. *Tylney* (4) shews that Wilde, C.J., was of opinion that if a solicitor had a forged deed brought to him by his client he would not be entitled to go before a magistrate, and if he did, the magistrate could not receive his statement against his client. *Reg.* v. *Hankins* (5) is a case in which Coltman, J., held that a solicitor ought not to produce, on a trial of his client for perjury, the document in respect of which the perjury was charged, that document having come into his hands in the course of his professional employment. Suppose it be said that, though Mr. Goodman was acting professionally the defendants were not consulting him in a legitimate way so as to entitle them to claim privilege, to that the answer is, that apart from Mr. Goodman's evidence there was no evidence of it. It is sufficient here to contend merely that a professional man's mouth is not to be opened as to what passed with him in what was primâ facie professional confidence, without evidence being first given to shew that no professional confidence could or ought to have existed, though, as we contend, authorities put the matter higher. Independent evidence should have been called to destroy the privilege before the solicitor was examined, and the case as stated does not shew this.

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(1) 2 Fox & Smith, 379.

(2) 2 B. & B. 4.

(3) 1 My. & K. 98; Roscoe's Dig. of Evidence in Crim. Cases, 10th ed. pp. 154–157.

(4) 5 C. & P. 592.

(5) 1 De G. & Sm. 12.

(6) 1 Sim. (N.S.) 1.

(7) 32 L. J. (Ch.) 284.

(8) 1 Phil. and Arnold on Evidence, 118.

(9) 8 C. & P. 596.

[WATKIN WILLIAMS, J. The question, certainly, that presses upon me here is, what foundation was laid for admitting Mr. Goodman's evidence?

LOPES, J. That is, I think, probably a point that has to be considered, but the point at the trial made was that such evidence was in itself inadmissible.]

Here there were, so far as appears, no facts to destroy privilege

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(1) 18 L. J. (M.C.) 36; 1 Den. C.C. 319.

(2) 2 C. & K. 234.

(3) 2 C. & K. 313; 1 Den. C. C. 197.

(4) 18 L. J. (M.C.) 36; 1 Den. C. C. 319, 325.

(5) 2 C. & K. 823.

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given in evidence before Mr. Goodman was called. It is impossible to say you are to have the secret of the client disclosed in public, so as to see if it ought to be disclosed. There was nothing to shew the defendants had any fraud in view when they went to, or, indeed, when they came away from, the solicitor; they went to see what they might honestly do, and, so far as is known, did nothing dishonest till long after, and certainly they did not get the solicitor to aid in any dishonesty, or even ask him to do so. It was an honest professional consultation. Could a prisoner's solicitor who had questioned his client with a view to his defence be put into the box and forced to say, in answer to a question, "Did you ask him how he accounted for so and so?" "Yes, I did, and he could not account for it," or "He said so and so," which is then proved to be plainly a falsehood.

Lastly, the question for the Court is, was the evidence properly received, which means, was it, under the circumstances then proved in evidence properly received.

Woollett, (*Willoughby*, with him), for the prosecution. Can a consultation with a view of committing a crime be privileged; is such a consultation within the scope of a solicitor's employment? That is the question raised; no point was made that some of the other evidence should have been taken before Mr. Goodman was called. The objection was, that the evidence was not evidence that could be received, and consequently that is the only point reserved, and no statement is made in the case of facts and circumstances with regard to the interpleader which had been proved before. In *Reg.* v. *Orton* (1), which was a trial at bar, Cockburn, C.J., upon objection being made that a document sought to be put in evidence by the prosecution was inadmissible as being entrusted to the prisoner's solicitor professionally, rules as follows:—"I take it that if a matter is communicated to an attorney in the confidential relation of attorney and client, and if that has been done for the purpose of working out a fraud, fraud would destroy the privilege, for the purpose for which the communication was made would deprive it of the character of a privileged communication." Lush, J., says "I am disposed to put it on still wider ground, and to hold that the law does not allow under the name of privilege any person to withhold evidence which is within his power, which may be used in support of a criminal charge." In the case of *Tichborne* v. *Lushington* (1), Bovill, C.J., is reported as saying "It must not be understood that I give the slightest sanction for there being any privilege of a client who consults an attorney as to the concoction or with respect to the committing of a crime or a fraud. I believe the law is, and properly is, that if a party consults an attorney and obtains advice for what afterwards turns out to be the commission of a crime or a fraud, that party so consulting the attorney has no privilege whatever to close the lips of the attorney from stating the truth." In *Gartside* v. *Outram* (2), Wood, V.C., states the matter very strongly, and calls attention to *Annesley* v. *Anglesea.* (3) He further cited *Reg.* v. *Downer* (4); *Russell* v. *Jackson* (5); *Charlton* v. *Coombes* (6); *Follett* v. *Jeffereys* (7); *Wadsworth* v. *Hamshaw.* (8) In each case it is for the judge to exercise his discretion as to such evidence, and no point as to the exercise of such discretion is reserved here, but the bare question, assuming proper circumstances proved, could this evidence be legally admitted?

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(1) Shorthand Notes, vol. iii. p. 2381.

E. Clarke, in reply. The judge decided nothing absolutely, but has left it to this Court now to say whether he ought to have admitted the evidence. It is not a question of discretion. The rule contended for is that a solicitor shall not be forced or allowed to betray professional confidence without evidence first given, ab extra, to shew that the case is not one where professional confidence can, or ought lawfully to exist. The fraudulent or criminal purpose should be proved not assumed.

GROVE, J. We are all of opinion that this conviction should be affirmed, but as the case is of great general importance we shall deliver a considered judgment on a future day, endeavouring to define the principles with clearness to act as a guide in future cases.

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(1) Shorthand Notes, p. 5211.
(2) 26 L. J. (Ch.) 113, 115.
(3) 17 St. Tr. 1139.
(4) 43 L. T. (N.S.) 445; 14 Cox, 486.
(5) 9 Hare, 387.
(6) 32 L. J. (Ch.) 284.
(7) 1 Sim. (N.S.) 1.
(8) 2 B. & B. 4, n.

Dec. 20, 1884. On a subsequent day the judgment of the court was delivered by STEPHEN, J., as follows:—This case was tried before the Recorder of London at the February sessions of the Central Criminal Court. The defendants were convicted subject to a case reserved for our opinion. The case was argued first before five judges on the 5th of April, and afterwards, on account of its great importance, before ten judges on the 21st of June. We said on that occasion that we were unanimously of opinion that the conviction must be confirmed, but we deferred the statement of our reasons in order that they might be given with due fullness and deliberation. The facts were as follows:—The two defendants, Richard Cobden Cox and Richard Johnson Railton, were indicted for a conspiracy with intent to defraud Henry Munster. The indictment was set out as part of the case.

It contained six counts, and was objected to on grounds which we do not think it necessary to state, as we were all of opinion that some at least of the counts were good; and as the objections made to others were not insisted on in argument. The serious question was as to the admissibility of the evidence of a solicitor which was given under the following circumstances:—On the 9th of April, 1881, the two defendants entered into a partnership in the business of newspaper proprietors with respect to a newspaper called the *Brightonian*. In February, 1882, Mr. Munster brought an action against Railton for a libel which appeared in that paper. On the 24th of June, 1882, the action ended in a verdict for the plaintiff for 40*s.* and costs as between solicitor and client. The costs were taxed on the 18th of August, and on the 20th execution was issued against Railton for the amount. The sheriff was met by a bill of sale from Railton to Cox, dated the 12th of August, 1882, and withdrew. An interpleader action to test the validity of the bill of sale was tried on the 15th of January, 1883. At that action the deed of partnership of the 9th of April, 1881, was produced, bearing upon it an indorsement purporting to be a memorandum of dissolution of partnership dated the 3rd of January, 1882. The case for the prosecution was, that the bill of sale was a fraudulent bill of sale of the partnership assets, entered into between Railton and Cox while they were partners, for the purpose of depriving Mr. Munster of the fruits of his judgment, and that the memorandum of dissolution of partnership was indorsed on the deed, not on the 2nd of January, 1882, when it bore date, but subsequently to Mr. Munster's judgment. In order to prove this case, Mr. Goodman, a solicitor, was called, who said (his evidence having been objected to, and the objection having been overruled):—"On the 28th of June, or thereabouts, Railton and Cox came to me, Railton said, 'I suppose you have heard the result of the Munster case?' I said 'Yes.' He said, 'Can anything be done to prevent the property being seized under an execution?' I said, 'Only a sale to a bona fide purchaser.' He said, 'Could the property be sold and I remain in possession as manager?' I said, 'No, you must get out of possession.' He said, 'That won't do; can I give a bill of sale to Mr. Cox?' I said, 'You cannot, because of the partnership.' Railton said, 'Does anyone know of the partnership besides you and ourselves?' I said, 'No, not that I am aware of, only my clerks.' Cox said, 'Then you do not think a bill of sale will do?' I said, 'Certainly not.' They then asked my fee, and paid it, and left the office. Nothing was said about a dissolution at that interview. The interview was with me as a solicitor, and I was paid my fee. It was expressly arranged that the partnership should be kept secret. Nothing either way was said about a dissolution." The question for our decision was whether this evidence was rightly admitted. We must take it, after the verdict of the jury, that so far as the two defendants, Railton and Cox, were concerned, their communication with Mr. Goodman was a step preparatory to the commission of a criminal offence, namely, a conspiracy to defraud. The conduct of Mr. Goodman, the solicitor, appears to have been unobjectionable. He was consulted in the common course of business, and gave a proper opinion in good faith. The question, therefore is, whether, if a client applies to a legal adviser for advice intended to facilitate or to guide the client in the commission of a crime or fraud, the legal adviser being ignorant of the purpose for which his advice is wanted, the communication between the two is privileged? We expressed our opinion at the end of the argument that no such privilege existed. If it did, the result would be that a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and that the solicitor to whom the application was made would not be at liberty to give information against his client for the purpose of frustrating his criminal purpose. Consequences so monstrous reduce to an absurdity any principle or rule in which they are involved. Upon the fullest examination of the authorities we believe that they are not warranted by any principle or rule of the law of England, but it must be admitted that the law upon the subject has never been so distinctly and fully stated as to shew clearly that these consequences do not follow from principles which do form part of the law, and which it is of the highest importance to maintain in their integrity. We must also observe that decisions have been given, one by the Court of Common Pleas, and several by single judges sitting in the Crown Courts, or at Nisi Prius, which have afforded some countenance to the supposition that the law of England is committed to doctrines from which these consequences might be deduced. We propose, accordingly, first to state what, upon a full consideration of the cases, appears to us to be the principle upon which the present case must be decided, and then to examine the principal cases in which it has been applied, with the view of shewing that our decision is not inconsistent with the great majority of them though it undoubtedly does differ from others. The case which has always been regarded as the great leading authority on the question of the privilege of legal advisers is *Greenough* v. *Gaskell* (1) decided by Lord Brougham in 1833. The question in that case was whether a solicitor, Gaskell, charged with a fraud upon Greenough arising out of the affairs of Darwell, could be compelled to disclose to Greenough communications between Gaskell and Darwell, giving an account of the transactions which led to the commission of the alleged fraud, and it was held that he could not. In this case the rule as to professional communications was laid down in the following words:—" If, touching matters that come within the ordinary scope of professional employment, they " (legal advisers) " receive a communication in their professional capacity, either from a client or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness." Lord Brougham adds:—"The foundation of this rule is not difficult to discover." . . . "It is out of regard to the interests of justice, which cannot be upholden, and the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings." Lord Brougham then proceeds to comment on the terms of the rule so stated, and to shew that many apparent exceptions to it are not really within its terms. This rule has been accepted and acted upon ever since, and we fully recognise its authority, but we think that the present case does not fall either under the reason on which it rests, or within the terms in which it is expressed. The reason on which the rule is said to rest cannot include the case of communications, criminal in themselves, or intended to further any criminal purpose, for the protection of such communications cannot possibly be otherwise than injurious to the interests of justice, and to those of the administration of justice. Nor do such communications fall within the terms of the rule. A communication in furtherance of a criminal purpose does not "come into the ordinary scope of professional employment." A single illustration will make this plain. It is part of the business of a solicitor to draw wills. Suppose a person, personating some one else, instructs a solicitor to draw a will in the name of the supposed testator, executes it in the name of the supposed testator, gives the solicitor his fee, and takes away the will. It would be monstrous to say that the solicitor was employed in the "ordinary scope of professional employment." He in such a case is made an unconscious instrument in the commission of a crime. It is probable that if cases of this kind had been present to Lord Brougham's mind when he delivered judgment in *Greenough* v. *Gaskell* (1), he would have inserted words by way of exception or explanation to express his meaning more explicitly, but the caution with which he worded the principle appears to us to have the same effect as the insertion of such a qualification would have had. It seems to us, at all events, that the case which we are now considering falls neither within the letter nor the spirit of the description given by Lord Brougham of the privilege of legal advisers. We will now state in the order of time the cases which confirm us in this view. In *Follett* v. *Jefferyes* (1) a defendant was interrogated as to letters written by her to her solicitor, said to have been intended to carry out a fraud. It was held that what she proposed to do was not fraudulent, but at the end of his judgment Lord Cranworth, then Vice-Chancellor, said, "It is not accurate to speak of cases of fraud contrived by the client and solicitor, in concert together, as cases of exception to the general rule. They are cases not coming within the rule itself; for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence, and no Court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor."

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(1) 1 My. & K. 98.

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(1) 1 My. & K. 98.

It is true that this is only a dictum, but it shews decisively how Lord Cranworth understood the rule on this subject, and this suggests another observation. In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud. To return to our former illustration. If A., proposing to forge a will, says to B., a solicitor, "forge for me a will in the name of C.," he asks B. to commit a crime which is not B.'s professional business. If he says, "I am C., and I want you to make my will for me," he reposes no confidence in B., but on the contrary, commits a gross fraud upon him. In 1851 the case of *Russell* v. *Jackson* (1) was decided before Turner, V.-C. It was alleged that a testator had left certain property upon a secret trust, and his solicitor was examined as to the existence of the trust and its nature. A motion was made to suppress his deposition, on the ground that he had been compelled to violate professional confidence in making it. Turner, V.-C., held that the privilege did not exist at all as between different people claiming under the client, as the client's intentions were more likely to be carried out if his communications with his solicitor were known than if they were concealed. It was further objected that the disclosure of the communications "might lead to the disclosure of an illegal purpose." Sir George Turner observed on this that he thought that the communication could not be protected on that account. He added, "On the contrary, I am very much disposed to think that the existence of the illegal purpose would prevent any privilege attaching to the communication. Where a solicitor is a party to a fraud no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor; and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law." In 1857 the case of *Gartside* v. *Outram* (2) was decided by Lord Hatherley, then Sir W. Page Wood. It was a case in which a firm of wool brokers sought to restrain a man who had been their sale clerk from disclosing their transactions. He replied that the transactions were fraudulent. The Vice-Chancellor delivered a judgment, which we think is well summed up by the head-note: "Confidential communications involving fraud are not privileged from disclosure." The following observations in the judgment appear to us very weighty, and bear directly on the present question. "The true doctrine is, that there is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence cannot exist." He afterwards refers, by way of illustration, to the question of professional confidence.

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(1) 1 Sim. (N.S.) 1.

(1) 9 Hare, 387.

(2) 26 L. J. (Ch.) 113.

"As regards the question before courts of justice when the question has been whether a witness ought to disclose that which has been communicated to him, I think the authorities largely preponderate for allowing no such protection even in one of the most confidential relations—that between attorney and client;" and after referring to some cases, which we shall examine more fully hereafter, he says that he adopts as his own language used in argument in the case of *Annesley* v. *Anglesea* (1) by Serjeant Tisdall, "I shall beg leave to consider whether an attorney may be examined to any matter which came to his knowledge as an attorney. If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one which lies on every member of society to discover every design which may be formed contrary to the laws of society to destroy the public welfare." The Vice-Chancellor quotes with approbation parts of the judgment of the judges in the same case and to much the same effect. The last of this series of cases to which we shall refer appears to us to be directly in point in the present case. It is part of the case of *Reg.* v. *Orton* (2), for perjury. Orton was indicted for perjury in denying that he was Orton, and affirming that he was Tichborne. He gave Mr. Holmes, a solicitor, instructions to prepare a will disposing of the property to which he said he was entitled; and as part of the evidence against him consisted in the alleged resemblance of his handwriting to that of Orton and its alleged difference from that of Tichborne, the instructions for the will were tendered for the purpose of enforcing this argument. They were objected to on the ground of professional privilege, and the Court dealt with the matter as follows:—"Cockburn, C.J.—We must assume, primâ facie, for the purpose of the inquiry, but only for that purpose, that the purpose which the defendant had in seeking to obtain these estates, which he proposed here to dispose of by the will for which he gave instructions to Mr. Holmes, was a fraudulent purpose, that of obtaining estates to which he was not entitled. Then the principle on which we proceed is this: that where anything is done, any communication made from a client to an attorney, with reference to a fraudulent purpose, the privilege does not exist; the fraudulent character of the communication takes away the privilege. Now, here, assuming hypothetically, for the mere purpose of the argument, that which is the subject-matter of this inquiry, which the jury will have eventually to determine, that the defendant was engaged in a fraudulent scheme to acquire estates to which he was not entitled, and gives instructions for a will, by which will these estates which he thus fraudulently seeks to acquire are to be disposed of, and amongst other things these estates, or portions of them, are intended to be given to his attorney and other persons who are co-operating with him in this scheme. Now, inasmuch as this would be for the purpose of having the effect of stimulating the attorney to more activity and earnestness in assisting him to carry out this scheme, which we assume for the purpose is based in fraud and iniquity, then that is dehors the privilege. If he had told his attorney beforehand that he was seeking to acquire estates which he was not entitled to, and employed the attorney for the purpose, the attorney, however innocent, in the one case, of course he would not be innocent, but assuming the attorney knew nothing of the iniquity of wickedness of the purpose, but believed himself honestly employed, yet if the client had a dishonest purpose in view in the communication he makes to his attorney with the view of making the attorney the innocent instrument of carrying out the fraud, it deprives the communication of the privilege. So I think here that if the communication has not for its immediate object the carrying out of a fraud, but still affects the accomplishment of it by inducing the attorney to take greater care, and to use more diligence, and to be more careful than he otherwise would be in the furtherance of the thing, it still comes to the same thing. Of course, in deciding such a question, we must for the purpose assume that the purpose was a fraudulent one; because that is the way the case is presented to us. Of course, we are not pronouncing any opinion as to the affirmative. We have still the inquiry involving that question, but whatever further inquiry there may be, I think it is admissible." Mellor, J., agreed. Lush, J., said:—"I am disposed myself to put it on this ground, and to hold that the law does not allow under the name of privilege any person to withhold evidence which is within his power, which may be used in support of a criminal charge."

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(1) 17 Howell St. Tr. 1139.

(2) Shorthand Notes, vol. iii. p. 9381.

In the case of *Tichborne* v. *Lushington* (1), out of which the prosecution of Orton for perjury arose, Bovill, C.J., at the close of the case, said, "I believe the law is, and properly is, that if a party consults an attorney, and obtains advice for what afterwards turns out to be the commission of a crime or a fraud, that party so consulting the attorney has no privilege whatever to close the lips of the attorney from stating the truth. Indeed, if any such privilege should be contended for, or existed, it would work most grievous hardship on an attorney, who, after he had been consulted upon what subsequently appeared to be a manifest crime and fraud, would have his lips closed, and might place him in a very serious position of being suspected to be a party to the fraud, and without his having an opportunity of exculpating himself. . . . There is no privilege in the case which I have suggested of a party consulting another, a professional man, as to what may afterwards turn out to be a crime or fraud, and the best mode of accomplishing it."

Upon these grounds, we consider that the question asked of Mr. Goodman in the present case was properly put and answered. We now proceed to consider the cases, some of which have produced a different impression. We may first shortly notice three Chancery cases to which we have been referred. In one of these —*Kelly* v. *Jackson* (2)—it was decided that a solicitor who had suggested a fraud to his client could not claim privilege on the ground that his knowledge of the matter was derived from his client. In the other two—*Mornington* v. *Mornington* (3) and *Charlton* v. *Combes* (4)—it was held that where client and solicitor were co-conspirators in a fraud, the solicitor must be charged with the fraud if discovery was required of him, but nothing was said as to the case of fraudulent or criminal communications by a guilty client to an innocent solicitor. We may accordingly pass by these cases without further notice. The cases, decided at

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(1) Shorthand Notes, p. 5211.

(2) 13 Ir. Eq. 129.

(3) 2 J. & H. 697.

(4) 32 L. J. (Ch.) 284.

Nisi Prius or in the Courts of Common Law, are as follows, taking them in order of time:—The first is *Annesley* v. *Anglesea* (1), tried in Dublin in 1743. We have already mentioned the principal point in this case, as having been quoted with approval by Lord Hatherley in *Gartside* v. *Outram*. (2) The question was whether Lord Anglesey had caused Annesley, the true heir to the property, to be kidnapped and carried off to America, in order that Lord Anglesey might enjoy the family estates. The evidence offered was that Lord Anglesey had employed an attorney to prosecute Annesley for murder in respect of the death of a person whom Annesley had accidentally killed, saying he would "give 10,000*l*. if he could get him hanged." On this evidence the remarks already quoted, and others to the same effect, were made on a trial at bar. The next case was *Rex* v. *Dixon* (3), decided in 1765. In this case one Pearse had produced forged vouchers before a master in Chancery, and Dixon, his attorney, was subpœnaed to produce them to the grand jury, before which Peach was indicted. He refused, and an attachment was moved for against him, but the Court refused to grant it. It does not appear how the papers came into Dixon's hands. There is certainly nothing to shew that Peach gave them to him for any unlawful purpose. He may have deposited them with him after the crime, and for the purposes of his defence. The next case is *Cromack* v. *Heathcote* (4), decided in 1820. In this case the question was whether a deed was fraudulent, and, "to prove the fraud, the defendant proposed, among other evidence, to call Smith, an attorney, to whom the father" (the assignor) "had applied to draw the assignment, and who had refused to draw it, knowing that an execution had been issued against the father." The full Court of Common Pleas (Dallas, C.J., and Burrough and Richardson, JJ.) held that this evidence was rightly rejected at the trial. This case closely resembles the one now before us. Indeed, the only distinction is that the objection taken to the evidence was that the privilege of solicitors extended only to communications made in the progress of a cause. The Court, accordingly, do not seem to have had before them the considerations to which we have addressed ourselves. If the case cannot be supported on this ground we differ from it, as it seems to us to be opposed, not only to all principle, but to the series of authorities which we have already referred to. It is right to say that *Cromack* v. *Heathcote* (1) is approved of in *Greenough* v. *Gaskill* (2), and in other cases, but it is cited only as a general statement of the doctrine of privilege, and the particular point now under consideration is not discussed or mentioned. The point for which it is cited is, that it decides that privilege is not confined to communications made in the course of a suit. The next case is *Rex* v. *Smith.* (3) In this case Holroyd, J., refused to compel an attorney to produce a forged promissory note which the prisoner had given to him in order to sue upon it. It had been produced before the magistrates, and returned to the attorney at his request, as he said he had a lien on it. We do not agree with this decision. It was said not to be law by Patteson, J., in *Reg.* v. *Avery* (4), though some years afterwards he said that "the observations he was reported to have made about it seem too strong": *Reg.* v. *Tuffs.* (5) The Nisi Prius case of *Doe* v. *Harris* (6) decided in 1833 by Justice, afterwards Baron Parke, was precisely similar to *Cromack* v. *Heathcote* (1), and was decided expressly on the authority of that case. The case of *Knight* v. *Turquand* (7) was also mentioned to us. It is enough to say of it that it was not a case of fraud or crime.

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(1) 17 St. Tr. 1139.

(2) 26 L. J. (Ch.) 113.

(3) 3 Burr. 1687.

(4) 2 B. & B. 4.

The next case is *Reg.* v. *Hayward and Others.* (8) In that case Pollock, C.B., admitted a forged will which the prisoners by a trick had got into the possession of the attorney who produced it, hoping that he might act on it, as he did. The judges held that this will was rightly admitted, there having been no professional confidence, "even if that would have made any difference." This case is an authority in favour of the view taken by us. There can in reason be no distinction between getting a will into a solicitor's possession by fraudulently putting it amongst other documents, and getting his advice by telling a lie as to the object for which it is asked. The last case to be mentioned is *Reg.* v. *Tuffs.* (1) In this case the indictment was for forging a will. It had been put into the hands of an attorney in order to be put in force, and the question was whether he could produce it in evidence. The evidence was admitted, and on the prisoner's conviction a case was reserved for the fifteen judges. They recommended a pardon on another point, and gave no opinion as to the admissibility of the evidence. From the observations made during the argument by different learned judges, as reported in the Law Journal, it would seem that there was some difference of opinion on the subject: see *Reg.* v. *Tylney.* (2)

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(1) 2 B. & B. 4.

(2) 1 My. & K. 98.

(3) 1 Phillips & Arnold on Evidence, 118, A.D. 1822.

(4) 8 C. & P. 596, A.D. 1838.

(5) 1 Den. C. C. 324.

(6) 5 C. & P. 592.

(7) 2 M. & W. 101, A.D. 1836.

(8) 2 C. & K. 234, A.D. 1846.

From this examination of the authorities it will be seen that we differ from one decision of the full Court of Common Pleas, and from two decisions at Nisi Prius; but we do so on the strength of other decisions which appear to us not only to be of greater authority, but also to be more in accordance with legal principles as well as with justice and expediency. We have one other matter to notice. We were greatly pressed with the argument that, speaking practically, the admission of any such exception to the privilege of legal advisers as that it is not to extend to communications made in furtherance of any criminal or fraudulent purpose would greatly diminish the value of that privilege. The privilege must, it was argued, be violated in order to ascertain whether it exists. The secret must be told in order to see whether it ought to be kept. We were earnestly pressed to lay down some rule as to the manner in which this consequence should be avoided. The only thing which we feel authorized to say upon this matter is, that in each particular case the Court must determine upon the facts actually given in evidence or proposed to be given in evidence, whether it seems probable that the accused person may have consulted his legal adviser, not after the commission of the crime for the legitimate purpose of being defended, but before the commission of the crime for the purpose of being guided or helped in committing it. We are far from saying that the question whether the advice was taken before or after the offence will always be decisive as to the admissibility of such evidence. Courts must in every instance judge for themselves on the special facts of each particular case, just as they must judge whether a witness deserves to be examined on the supposition that he is hostile, or whether a dying declaration was made in the immediate prospect of death. In this particular case the fact that there had been a partnership (which was proved on the trial of the interpleader issue), the assertion that it had been dissolved, the fact that directly after the verdict a solicitor was consulted, and that the execution creditor was met by a bill of sale which purported to have been made by the defendant to the man who had been and was said to have ceased to be his partner, made it probable that the visit to the solicitor really was intended for the purpose for which, after he had given his evidence, it turned out to have been intended. If the interview had been for an innocent purpose, the evidence given would have done the defendants good instead of harm. Of course the power in question ought to be used with the greatest care not to hamper prisoners in making their defence, and not to enable unscrupulous persons to acquire knowledge to which they have no right, and every precaution should be taken against compelling unnecessary disclosures.

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(1) 1 Den. 319, 325, A.D. 1848, 18 L. J. (N.S.) (M.C.) 36.

(2) 18 L. J. (M.C.) pp. 37, 38.

Conviction affirmed.

Solicitor for prosecution: *The Solicitor to the Treasury.*
Solicitors for defendants: *Palmer & Bull.*

C. D.

[IN THE COURT OF APPEAL.]

1884
Nov. 28.

Ex parte NEWITT. In re MANSEL.

Bankruptcy—Liquidation—Removal of Trustee by Court—Jurisdiction—Discretion of Registrar—" Cause shewn "—Bankruptcy Act, 1869 (32 *&* 33 *Vict. c.* 71), *s.* 83. (1)

The power given to the Court by subs. 4 of s. 83 of the Bankruptcy Act, 1869, to "remove any trustee upon cause shewn," authorizes the removal of one of several co-trustees without the removal of all.

"Cause shewn" does not mean only conduct amounting to fraud or dishonesty on the part of the trustee; it is enough to prove conduct—such as vexatious obstruction of the realization of the estate in the interest of the debtor—which shews that it is no longer fit that the trustee should remain a trustee.

Though the making of an order to remove a trustee is not a matter of pure discretion, and the Court of Appeal is bound to see that cause was shewn in order to found the jurisdiction of the registrar, yet, if the facts are capable of two reasonable interpretations, the Court of Appeal will trust to the discretion of the registrar in determining which is the more reasonable interpretation of the two, and will not disturb his order for the removal of a trustee, he, from his acquaintance with the proceedings throughout, having far better means of judging than the Court of Appeal has.

Appeal from an order made by Mr. Registrar Hazlitt on the 2nd of August, 1884, removing Mr. E. J. Newitt from his office of trustee in the liquidation of Sir R. M. Mansel, Bart.

The liquidation petition was filed on the 28th of June, 1883. On the 5th of September, 1883, the creditors resolved on a liquidation by arrangement, and appointed Newitt and J. J. Saffery trustees. The application for the removal of Newitt was made by Saffery. The grounds of the complaint made by him against Newitt were thus stated in the registrar's judgment—(1.) That he would not concur with Saffery in an application to have certain moneys which were standing in the debtor's name in the bank of Messrs. Child & Co. transferred to the trustees as being part of the debtor's estate. (2.) That he frustrated the sale of a yacht which had been ordered by the Court to be sold as part of the estate. (3.) That he refused to concur in the sale of the debtor's life interest in some real estate.

The registrar said, "These specific charges are involved in a general complaint that Newitt has for some time past been deliberately and unfairly obstructing the due realization of the estate, against the interest of the general body of creditors, in collusion with the debtor and his solicitor." The registrar summed up his judgment thus: "The case is a strong illustration of the mischief of dual trustees, and as Mr. Newitt has, in my view, segregated himself from Mr. Saffery in the trust, and has for some time past adopted the position of agent to the debtor and his particular circle, I think it right to remove him from the office of trustee."

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(1) Vide Bankruptcy Act, 1883, ss. 84, 86.

The order as drawn up was, that Newitt "be removed from his office of trustee hitherto held by him in conjunction with J. J. Saffery, and he is hereby removed accordingly. And it is further ordered that the said E. J. Newitt do personally pay to the said J. J. Saffery the costs of the motion."

Newitt appealed.

Cooper Willis, Q.C, and *Sidney Woolf*, for the appellant. The Court has no power, under s. 83 of the Bankruptcy Act, 1869 (1), to remove one of two trustees unless it removes them both. The Court cannot appoint a trustee; it is only the creditors who can do that.

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(1) Sect. 83 (1). "The creditors may, if they think fit, appoint more persons than one to the office of trustee, and where more than one are appointed they shall declare whether any act required or authorized to be done by the trustee is to be done by all or any one or more of such persons, but all such persons are in this Act included under the term 'trustee,' and shall be joint tenants of the property of the bankrupt. The creditors may also appoint persons to act as trustees in succession in the event of one or more of the persons first named declining to accept the office of trustee.

(2.) "If any vacancy occur in the office of trustee by death, resignation, or otherwise, the creditors in general meeting shall fill up such vacancy, and a general meeting for the purpose of filling up such vacancy may be convened by the continuing trustee, if there be more than one, or by the registrar on the requisition of any creditor.

(4.) "The Court may, upon cause shewn, remove any trustee. The creditors may, by special resolution at a meeting specially called for that purpose, of which seven days' notice has been given, remove the trustee and appoint another person to fill his office, and the Court shall give a certificate declaring him to be the trustee.

(5.) "If a trustee be adjudged bankrupt, he shall cease to be trustee, and the registrar shall, if there be no other trustee, call a meeting of creditors for the appointment of another trustee in his place."

When creditors appoint two trustees it is because they have confidence in the two acting together; they do not intend that one of them shall act alone. If the registrar removes a trustee, the creditors ought to be summoned to fill up the vacancy. The order does not provide for calling a meeting of the creditors, and it has the effect of making Mr. Saffery the sole trustee.

[Baggallay, L.J. In *Ex parte Oulton* (1), under the Bankruptcy Act, 1849, one of two assignees was removed for misconduct on the application of his co-assignee.]

The point was not raised whether the removal of one had the effect of removing all. This is a question affecting the appellant's character. The order is not a pure exercise of discretion. This Court is entitled to look at the evidence to see whether the order can be supported. The registrar's general knowledge of the proceedings in the bankruptcy ought not to be imported into the decision of a question affecting the character of a particular trustee.

Bigham, Q.C., and *Henry Kisch*, for Saffery, were not heard.

Baggallay, L.J. The case is one of the simplest kind. There being two trustees, and a difference having arisen between them as to the administration of the estate, the registrar has removed one of them. I think he was quite right in removing one; the only question could be which of them ought to go. The application was made by Mr. Saffery, who desired that there should be an immediate realization of the debtor's assets. The registrar came to the conclusion that, in regard to the sale of the yacht and of the debtor's life interest in some real estate, Mr. Newitt was acting in the interest of the debtor, in an interest antagonistic to that of the creditors, and that it was therefore undesirable that he should any longer remain a trustee. This appears to have been the view of the registrar, and it could hardly be right that under such circumstances both the trustees should remain. I do not understand the registrar to imply that Mr. Newitt had been guilty of any dishonest conduct, but only that he was actuated by that which is not in itself a dishonourable motive, viz., a desire to do the best he could for the debtor. With regard to the yacht, I am of opinion that Mr. Newitt did his best to frustrate the order which the Court had made for its sale. In my opinion, the registrar was perfectly justified in making the order upon the general grounds on which he professed to act. I go further, and say that, if a variety of matters were brought before the registrar, and he, acting to the best of his judgment, came to the conclusion that "cause" had been shewn for removing a trustee, I should not be disposed to overrule his decision. But in the present case I think he was quite right.

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(1) 3 M. D. & De G. 336.

It is said, however, that the registrar had no power under s. 83 to remove one trustee unless he removed both. This argument is based on what is said to have been the old practice under the Bankruptcy Act, 6 Geo. 4, c. 36, that when creditors had placed trust in two assignees in bankruptcy, you could not remove one of them without removing both.

But that that rule was not always acted upon is shewn by *Ex parte Oulton* (1), in which case the right of one of two assignees to apply to the Court to remove his co-assignee for misconduct was recognised. That case appears to me to be on all fours with the present case, and to shew that, independently of the provisions of the Act of 1869, one trustee might apply to the Court to remove his co-trustee on the ground of misconduct. But under s. 83 of that Act it seems to me clear that there is power to remove one of several trustees. Sub-s. 4 says that the Court may remove "any trustee." It is said that those words mean one trustee, if one alone has been appointed, but that they mean all the trustees if more than one has been appointed. I must confess that I cannot follow this argument. It seems to me that the words must include one trustee if there are several, and this view of the construction is confirmed by the other sub-sections. In my opinion this technical ground for the appeal fails.

Bowen, L.J. I am of the same opinion. The jurisdiction of the Court is based on or defined by sub-s. 4 of s. 83. I quite agree with the argument that the making of the order is not a pure exercise of discretion by the registrar, for the removal must be "upon cause shewn;" there must be "cause shewn" in order to found the jurisdiction. But still, although "cause" must be shewn, we must remember that the matter is one as to which the tribunal below has special means of judging, and we ought to trust considerably to the discretion of that tribunal. The registrar has watched the proceedings in the bankruptcy throughout, and has far better means of judging of the conduct of the trustee than the Court of Appeal, which has simply paper materials before it. No doubt the Court of Appeal is bound to see that there was jurisdiction to make the order; that "cause" was shewn. But, if the materials are capable of two reasonable interpretations, the Court of Appeal ought to recollect that the Court below has better means of judging which of the two interpretations is the more reasonable. In that sense we ought to trust to the discretion of the judge below, though he cannot give himself jurisdiction if "cause" is not shewn. I think this was the view taken by the Court of Appeal in *Ex parte Sheard.* (1) Was there then "cause shewn" for the removal of the trustee in the present case? I protest against its being said that "cause shewn" must be equivalent to dishonest conduct. I prefer not to attempt to define the meaning of the words "cause shewn." But there may be conduct shewing that it is no longer fit that a man should remain a trustee, though his conduct may fall far short of fraud or dishonesty. I do not for a moment suggest that Mr. Newitt has been acting dishonestly, or that he has been actuated by any but the best intentions. But there is a dead lock between the two trustees. Is the business of the creditors to be suspended indefinitely? The Court must ascertain what the interest of the creditors requires, and if it sees that the dead lock is caused by the vexatious conduct of one trustee, that it is his fault that the wheels will not run, it ought to remove him. I think that the vexatious conduct of Mr. Newitt has been due to some desire, no doubt in itself perfectly laudable, other than a desire to benefit the creditors. I am content to rest my judgment on his conduct with regard to the sale of the yacht. He did not actually disobey the order of the Court, but he sailed as near to the wind as he could. I think the registrar was right in removing him, at any rate he had good ground for thinking that he ought to do so. As to the argument that the Court cannot remove one trustee unless it removes them both, it is only necessary to look at the words of sub-s. 4 of s. 83: "the Court may, upon cause shewn, remove *any trustee*." It is said that these words mean "any trustee," if there is only one, and "any body of trustees," if there is a body of trustees. But the words are "any trustee," and why should they not have their natural meaning? It is said that sub-s. 1 alters the meaning, because it says that, where more trustees than one are appointed, "all such persons are in this Act included under the term 'trustee.'" But it is necessary to attend carefully to the language of an interpretation clause and ascertain what it really means. Here the clause says that the word "trustee" shall, in addition to its natural meaning, include something else. It does not, however, follow that because, when there are several trustees, they are all included under the words "trustee," each of them is not also included, especially in a clause the object of which is to facilitate the removal of trustees. That the construction which has been given to sub-s. 4, by Baggallay, L.J., is the correct one seems to me conclusively shewn by sub-ss. 2 and 5, which would otherwise be unintelligible. The reason of the thing and the interpretation of the Act coincide, and the authority of *Ex parte Oulton* (1) confirms this view. I think there is nothing in the argument that the registrar's order will prevent the calling of a general meeting of the creditors under sub-s. 3.

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(1) 3 M. D. & De G. 336.

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(1) 16 Ch. D. 107.

Fry, L.J. It is said that the power, given to the Court by sub-s. 4 of s. 83, to remove "any trustee" does not enable the Court to remove one of two trustees. It is said that it would be unreasonable to give the Court jurisdiction to remove one trustee, when the creditors have committed the administration of their affairs to the discretion of two, and have trusted to their joint action. That objection appears to me to be answered by sub-s. 2; the creditors will be called together in due course to exercise their discretion in appointing a new trustee. Then it is said that the word "trustee" has received an interpretation in sub-s. 1, and that when there are several trustees it must be read as meaning

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(1) 3 M. D. & De G. 336.

1884

EX PARTE NEWITT.
IN RE MANSEL.

Fry, L.J.

all of them. This argument appears to me on the face of it untenable. Sub-s. 1 does not say that the word "trustee" shall include, and shall include only, a body of trustees, but that it shall include a body of trustees. I will give an illustration of the absurdity of the argument that, when an interpretation clause says that a certain expression shall include something, it means that it shall include the thing referred to and nothing else. In the year 1850 the Act 13 & 14 Vict. c. 21, was passed to regulate the interpretation of future Acts of Parliament, and it provided by s. 4 that "in all Acts words importing the masculine gender shall be deemed and taken to include females." The result of the argument which has been addressed to us would be that in every Act which has been passed since 1850 the feminine gender is alone included. I am of opinion that cause has been shewn in the conduct of Mr. Newitt for his removal. I think the registrar was quite right, but, even if I had not entertained so strong an opinion, I agree that this Court must always pay great regard to the opinion of the registrar upon a matter with which he is much more familiar than we are. The appeal will be dismissed with costs, but we do not interfere with the registrar's order as to costs.

Solicitor for appellant: *J. C. Stogdon.*
Solicitors for respondent: *Beyfus & Beyfus*

W. L. C.

1884
Dec. 5.

[IN THE COURT OF APPEAL.]

Ex parte DEARLE. In re HASTINGS.

Bankruptcy Petition—Petitioning Creditor — Trustee for absolute Beneficial Owner—Joining Equitable Owner of Debt—Amendment of Petition — Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 4, *sub-s.* 1 (*g*), 5, 6, 105 (*sub-s.* 3).

Under the Bankruptcy Act, 1883, as under the Bankruptcy Act, 1869, a mere trustee of a debt for an absolute beneficial owner is not entitled to present a bankruptcy petition against the debtor unless the cestui que trust, if capable of dealing with the debt, joins as a co-petitioner.

Ex parte Culley (9 Ch. D. 307) followed.

When an act of bankruptcy has been committed by the failure of a debtor to comply with a bankruptcy summons, any creditor may avail himself of it for the purpose of presenting a bankruptcy petition against the debtor; the right to petition is not limited to the creditor who has served the bankruptcy notice.

A bankruptcy petition having been presented by a bare trustee of a debt, and dismissed on the ground that the cestui que trust ought to have been joined as a petitioner, leave was given by the Court of Appeal (though more than three months had elapsed since the presentation of the petition) to amend it by joining the cestui que trust, with her consent, but the appellant was ordered to pay the costs of the appeal, and the costs (if any) occasioned by the amendment.

Appeal from an order of Mr. Registrar Brougham, dismissing a bankruptcy petition.

On the 21st of May, 1884, a memorandum of agreement was entered into between A. G. Hastings, of the first part, and J. G. Dearle, of the second part (on behalf of Ada Dearle), by which, after a recital that one R. J. E. Carr was indebted to Ada Dearle in the sum of 1206*l.* 19*s.* 6*d.*, and that judgment had been obtained against Carr for that amount, it was agreed that, for the considerations therein mentioned, Hastings should guarantee the payment of the 1206*l.* 19*s.* 6*d.* by Carr to Ada Dearle, and Hastings undertook that, in the event of that sum remaining unpaid on the 29th of June, 1884, he (Hastings) would thereupon pay the said sum to J. G. Dearle on behalf of Ada Dearle.

Hastings and Dearle were both solicitors. Carr was also a solicitor. Ada Dearle was the sister of J. G. Dearle, and she had, through her brother, advanced 1200*l.* to Carr for investment by him. The 1200*l.* had not been repaid, and the 6*l.* 19*s.* 6*d.* represented interest upon it.

The 1206*l.* 19*s.* 6*d.* remained unpaid on the 29th of June, 1884, and Hastings did not pay it to Dearle in accordance with the guarantee. On the 1st of July, 1884, Dearle commenced an action against Hastings in the Queen's Bench Division on the guarantee, and on the 4th of August he recovered final judgment for 1214*l.* 1*s.* On the 7th of August he served Hastings with a bankruptcy notice for the amount of the judgment. Hastings failed to comply with the notice, and on the 16th of August, 1884, Dearle filed a bankruptcy petition against him in respect of the judgment debt of 1214*l.* 1*s.*, alleging the non-compliance with the bankruptcy notice as an act of bankruptcy. On the 20th of October the registrar dismissed the petition, on the ground that, the petitioner being a mere trustee of the debt for his sister, he alone could not, according to the practice of the court, as laid down in *Ex parte Culley* (1), present a bankruptcy petition in respect of it, but that his sister, who was his cestui que trust, must join as a co-petitioner.

Dearle appealed.

E. Clarke, Q.C., and *A. Wallace*, for the appellant. The only person who, under sub-s. 1 (g) of s. 4 of the Bankruptcy Act, 1883, can serve a bankruptcy notice on a debtor, is a creditor who has obtained a final judgment. The judgment is conclusive evidence that the debt is due to the petitioner. The objection ought to have been raised at the trial of the action. When an act of bankruptcy has been committed by a debtor, s. 5 provides that, "on a bankruptcy petition being presented by a creditor or by the debtor," the Court may make a receiving order, and s. 6 provides that "a creditor shall not be entitled to present a bankruptcy petition against a debtor unless" (inter alia) "(b) the debt is a liquidated sum, payable either immediately or at some certain future time." All these provisions shew that no one but the creditor who has obtained the judgment can present the petition. If any other name than that of J. G. Dearle had been added to the bankruptcy notice, it would have been surplusage, or the notice would have been bad. He is the only person defined by s. 5 as entitled to petition, and s. 6 makes this still clearer.

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Ex parte Dearle. In re Hastings.

[Brett, M.R. The question is whether the old rule has been altered, that, when the creditor is a mere trustee of the debt, the beneficial owner must join in the petition.

Lord Coleridge, C.J. Sect. 6 of the Bankruptcy Act, 1869, provided that the petitioning creditor's debt "must be a liquidated sum due at law or in equity," and yet it was decided in *Ex parte Culley* (1) that when the petitioning creditor was a mere trustee of the debt for an absolute beneficial owner, who was capable of dealing with the debt, the cestui que trust must join in the petition.

Brett, M.R. The Act of 1883 was passed with a knowledge of that decision.]

The provisions relating to a bankruptcy notice are new; the notice can only be served by a creditor who has obtained a final judgment.

[Lord Coleridge, C.J. The legal owner of the judgment debt serves the notice in order to constitute an act of bankruptcy. But who is entitled to present the bankruptcy petition? What is there to shew that the old rule is abrogated? The rule was founded on this consideration, that as against the cestui que trust the debtor might have an answer to the demand which might not be available as against the trustee.]

Sect. 5 says that "a creditor" may petition if a debtor commits an act of bankruptcy; it must be a creditor who is entitled to take advantage of the act of bankruptcy. No creditor can take advantage of the act of bankruptcy committed by failure to comply with a bankruptcy notice but the judgment creditor who has served the notice.

[Lindley, L.J. Rule 263 of the Bankruptcy Rules, 1883, preserves the old practice in bankruptcy matters when no other provision is made by the Act or the Rules.]

Provision is made by the Act in this case. If the appellant and his sister had joined in the petition, the objection would have been raised that the sister was not competent to petition, because the debtor had not failed to satisfy any debt due to her. Having regard to the words of the Act of 1883, *Ex parte Culley* (1) does not apply. If the old rule is still in force, a bankruptcy notice cannot be served by a creditor who is a mere trustee of a debt. The present question could not arise under the Act of 1869, because the right to issue a debtor's summons was not limited to a judgment creditor.

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At any rate, under s. 105, sub-s. 3, the Court has power to allow the petition to be amended, and under the circumstances this power ought to be exercised.

Cooper Willis, Q.C., and *Ellis J. Davis*, for the debtor, were called upon only on the question of amendment. No notice has been given of the intention to ask for leave to amend, and there is nothing to shew that the sister desires to be joined as a co-petitioner. The petition is more than three months old, and the amendment would be equivalent to the presentation of a new petition founded on an act of bankruptcy more than three months old. This would be contrary to the provisions of s. 6, sub-s. 1 (*c*).

Lord Coleridge, C.J. On the first point I am of opinion that the registrar's decision was right, and that the appeal must be dismissed. The rule was established before the Bankruptcy Act, 1869, that a creditor, who was a mere trustee of a debt for an absolute beneficial owner capable of dealing with the debt, could not present a bankruptcy petition in respect of the debt which was due to him in that character without the concurrence of the cestui que trust in the petition. There was a good reason for this rule, for otherwise before the Bankruptcy Act, 1869, when a merely equitable debt was not a ground for proceedings in bankruptcy against the debtor, a trustee might have been able to make a man a bankrupt, when the real owner of the debt had no debt at all, the debtor having a perfectly good defence against his demand. The Bankruptcy Act, 1869, provided that a man might be made a bankrupt in respect of a mere equitable debt. Under that Act the non-payment of an equitable debt might be an act of bankruptcy, and the owner of an equitable debt might present a petition in bankruptcy. In that state of things, and after the passing of the Judicature Act, 1873, it might have been contended, and it was strenuously contended in *Ex parte Culley* (1), that, by the joint operation of the Bankruptcy

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Act, 1869, by which an equitable debt was placed on the same footing as a legal debt, and of the Judicature Act, which enabled the assignee of a debt or chose in action to sue for it in his own name, and provided for the administration of law and equity concurrently, the reason for the old rule in bankruptcy had ceased, and the rule might be taken to have been abrogated. But in 1878 *Ex parte Culley* (1) was decided, and it is an express decision to the contrary. The argument to which I have referred was pressed on the Court of Appeal in that case as a ground for holding that the trustee of a debt could alone maintain a bankruptcy petition against the debtor. But James, L.J., Cotton, L.J., and the present Master of the Rolls, were all clearly of opinion that the old rule remained in force. I think James, L.J., rather intimated that the inclination of his mind (an inclination in which in the absence of authority I should have been disposed to share) was to get rid of the rule if it could be done. But he thought that in the face of the Bankruptcy Act, 1869, and of the Judicature Act, there was good reason for maintaining the old rule. He said (p. 309), "There is nothing in the Judicature Act, or in s. 6 of the Bankruptcy Act, to alter the old rule of law or practice of the Bankruptcy Court; that for the safety of mankind the beneficial owner must join in the requisite oath that the money is justly and truly due; that it has not been paid, and that he has no security for it. It was considered not sufficient to have only the oath of a man to whom in fact not a farthing was due, and who might know nothing at all about the security which the real owner had got." The present Master of the Rolls concurred in this view, and so did Cotton, L.J. This being the state of things in 1878, the Bankruptcy Act, 1883, was passed, and in the present case the trustee of a debt is the sole petitioning creditor. The cestui que trust on whose behalf and for whose benefit the petition is presented, and who is the person really entitled to the money, is his sister. The ground on which it is suggested that the brother can present the petition alone, and that the old rule in bankruptcy is to be considered at an end, is this, that, amongst a variety of things which are, by s. 4 of the Bankruptcy Act, 1883, made acts of bankruptcy, sub-s. 1 (*g*) provides that the failure of a debtor to comply with the requirements of a bankruptcy notice served on him by "a creditor who has obtained a final judgment against him for any amount," shall be an act of bankruptcy. In the present case the legal creditor—the trustee—had under Order XIV. of the Rules of the Supreme Court, 1883, obtained a final judgment against the debtor. He was (I do not say the only person who could), but he was a person competent to obtain that judgment. He did obtain it, and, on the money not being paid in compliance with the bankruptcy notice, an act of bankruptcy was committed by the debtor. Who is to take advantage of the act of bankruptcy? The appellant says that the only person who can do so is the creditor who has obtained the final judgment. No doubt, under sub-s. 1 (*g*) of s. 4, the creditor who has obtained the judgment is the person who must serve the notice which is to create the act of bankruptcy. But then comes s. 5, which says that, "if a debtor commits an act of bankruptcy, the Court may on a bankruptcy petition being presented, either by a creditor or by the debtor," make a receiving order. The argument is that, when a creditor has obtained a final judgment, and has served a bankruptcy notice which has resulted in an act of bankruptcy, "*a* creditor" in s. 5, means "*the* creditor who has obtained the final judgment," and that that creditor alone can present the petition. It is obvious that that conclusion does not follow from the words of the Act, which naturally imply that a creditor may present a bankruptcy petition founded on an act of bankruptcy which has been created by the intervention of another creditor. Independently of any question of trustee and cestui que trust there is nothing in the Act to shew that the creditor mentioned in s. 5, and the creditor mentioned in s. 4, sub-s. 1 (*g*), must be the same person. For my own part I think that he need not, and that a bankruptcy petition founded on the failure of a debtor to comply with a bankruptcy notice may be presented by another creditor who did not serve the notice. There appears, therefore, to be as grave reason for the existence of the old rule as ever there was, and, if there is nothing in the Act to alter it, it must be considered as still subsisting. Moreover, when the Act of 1883 was passed, the decision of the Court of Appeal in *Ex parte Culley* (1) had been given, and the framers of the Act of 1883 must be taken to have known of that decision, and they were no doubt well acquainted with the practice in bankruptcy, and yet, when a single word would have sufficed to alter the rule, they left it just as the Act of 1869 had done. The same argument which has been addressed to us was addressed without success to the Court of Appeal in *Ex parte Culley* (1), and it must equally fail now.

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Then arises the question whether we ought to allow an amendment of the petition. I think we have clearly power to do so under s. 105, and the only question is whether the case is a proper one for the exercise of the power? I think it is. A blunder by no means unnatural has been made in the construction of the Act; it is a mere slip. I think it would be just to allow the name of the sister, on proper terms, to be added as a co-petitioner, and that the proceedings should then be continued with the addition of her name; but I think that the person who has made the blunder must pay for it. The appellant will have a week within which to make the amendment, for which he must obtain the consent of his sister, and he must pay the costs of the appeal, and the costs (if any) occasioned by the amendment. The petition when amended must be re-served within a week. The amendment must be taken to have been made at the time when the petition was presented.

BRETT, M.R. In order to maintain a bankruptcy petition under the present Bankruptcy Act, there must be a good petitioning creditor's debt, a good act of bankruptcy, and the proper petitioning creditor. In the present case it cannot be doubted that there is a good petitioning creditor's debt—the debt is a judgment debt—and to my mind it is equally clear that there is a good act of bankruptcy. It is said that our present decision will shew that the judgment for the debt was obtained by the wrong person, and that, therefore, no act of bankruptcy has been committed. But I do not think our decision affects the validity of the bankruptcy notice at all; in my opinion the trustee was entitled to serve the bankruptcy notice alone. It is said that if the cestui que trust had joined in the notice, the notice would have been bad. I doubt that; I think the addition of her name would have been mere surplusage. I do not think it was necessary to add her name to the notice. The only question, then, is whether there is a proper petitioning creditor. If I did not think that there is a lurking suspicion in the mind of my Lord that *Ex parte Culley* (1) might and ought to have been decided differently, I should not add much to what he said. But I was a party to that decision, and I am still of opinion that it was the only right decision. It has long been the rule in bankruptcy that a bare trustee of a debt for an absolute beneficial owner capable of dealing with the debt cannot present a petition against the debtor without joining the cestui que trust as a petitioner. This was not a mere rule of practice; it was a rule of conduct founded on principle. For, if you took no notice of the cestui que trust, it might well happen there was no real debt at all, though in legal parlance there might be a debt. A cestui que trust who was competent to do so might have released the debt. I think the reason remained after the passing of the Bankruptcy Act, 1869, and that it remains after the passing of the Bankruptcy Act, 1883, just as much as it did before. By the Act of 1869 a new act of bankruptcy and a new petitioning creditor's debt were created. But no new petitioning creditor was created; there were no negative words as to the person who ought to be the petitioner. And, after hearing the very same argument as we have heard now, the Court of Appeal came to the conclusion that, the reason for the old rule being as strong as it was before the Act, and there being no negative words in the Act, the mere fact that a new act of bankruptcy and a new petitioning creditor's debt had been created by the Act did not alter the old rule as to the petitioning creditor when the debt was due to a trustee. So under the present Bankruptcy Act there is a new act of bankruptcy and a new petitioning creditor's debt, but there is not one word in the Act, affirmative or negative, as to who is to be the petitioning creditor. The principle of the decision in *Ex parte Culley* (1) applies under the Act of 1883 in precisely the same way as it did under the Act of

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1869, only the argument is much stronger, because the Act of 1883 was passed after that decision upon the Act of 1869, for if the legislature had intended to alter that decision, they had only to say so. It appears to me that *Ex parte Culley* (1) was decided on good and sound principles, and that those principles remain in force under the present Act as they did before. I think, therefore, that in the present case the trustee was not a good petitioning creditor alone, but that the cestui que trust ought to have joined in the petition. It is said that the words of the Act shew, that, when the act of bankruptcy is the failure to comply with a bankruptcy notice, the only person who can present a bankruptcy petition is the judgment creditor who has served the notice. But I think that, as soon as there is a good act of bankruptcy, any creditor who has a good petitioning creditor's debt can present a petition founded on that act of bankruptcy. There is, therefore, nothing in the Act to break in upon the old rule, and the old rule must stand. But I think that the appellant ought to be allowed to amend his petition on the terms which have been mentioned by the Lord Chief Justice.

Lindley, L.J. I am of the same opinion. It has been the settled rule in bankruptcy for a great many years that, in order to maintain a bankruptcy petition in respect of a debt due to a trustee for an absolute beneficial owner capable of dealing with the debt, the cestui que trust must join in the petition. The rule was intended for the protection of the debtor. The question now arises on the wording of the Act of 1883, whether it is still necessary that the cestui que trust should join in the petition, especially when the debt is one for which a judgment has been recovered by the trustee alone. In *Ex parte Culley* (1) it was held that the rule remained in force under the Bankruptcy Act, 1869, in the case of a trustee who was a judgment creditor. The reasons for that decision are as applicable now as before. But reliance is placed on the language of s. 5. That section in effect says that, if any act of bankruptcy is committed, any creditor may present a bankruptcy petition. We are asked to say that any creditor includes a judgment creditor, although he is a mere

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trustee. I do not see how we can do this, especially having regard to rule 263, which provides that the old practice is to remain in force where no other provision is made by the Act or the Rules. I think, therefore, that the registrar's decision was right. It does not appear that he was asked to allow the petition to be amended, and therefore the appeal must be dismissed with costs. But, as leave to amend has been asked for now, I think we ought to give it. The petitioner must, however, pay the costs of the amendment.

Solicitor for appellant: *J. G. Dearle.*
Solicitor for the debtor: *Benn Davis.*

W. L. C.

LANE, APPELLANT; COLLINS, RESPONDENT.

Dec. 15.

Adulteration—Sale of Food and Drugs Act, 1875 (38 *&* 39 *Vict. c.* 63), *s.* 6—*Sale of Article not of the Nature, Substance, and Quality of the Article demanded—Prejudice of the Purchaser.*

It was proved on an information under s. 6 of the Sale of Food and Drugs Act, 1875, that the appellant, who was an inspector under the Act, on asking the respondent, a milk seller, for "milk," was supplied by the respondent with milk which had been skimmed, and which was, in consequence, as compared with normal milk as it comes from the cow, deficient in butter fat to an extent of 60 per cent:—

Held, that on these facts it was not proved that any offence had been committed by the respondent against the provisions of s. 6 of the Sale of Food and Drugs Act, 1875.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43.

The facts were, in substance, as follows:

The appellant was an inspector appointed for the Wandsworth district in the county of Surrey under the Sale of Food and Drugs Act, 1875, and the respondent was a milk seller at Merton, within the said district.

The appellant laid an information under s. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), against the respondent, for that he did, on the 12th of May, 1884, within the Wandsworth district, sell to the prejudice of the purchaser an article of food, viz., milk, which was not of the nature, substance, and quality of the article demanded by such purchaser.

Upon the hearing of the summons which was granted upon the above information, it was proved that whilst the respondent was delivering milk in the ordinary course of his business in the Broadway, in the parish of Merton, the appellant stopped him and asked him for a pint of milk. Under the directions of the respondent a boy assisting the respondent served the appellant with a pint of milk, for which the appellant paid to the respondent the sum of 2*d.*

The appellant informed the respondent that he had bought the milk for the purpose of analysis, and gave him a sample. A portion of the milk so purchased by the appellant was analysed by the public analyst for the county of Surrey, who delivered a certificate to the effect that the milk so analysed by him was not a whole normal milk, but was deficient by 60 per cent. of butter fat.

On behalf of the appellant it was contended that, the appellant having asked for milk, the respondent should have supplied him with unskimmed milk, that is to say, milk in its own normal condition, and from which no butter fat had been abstracted.

The magistrate, however, dismissed the summons, on the ground that the respondent had committed no offence within s. 6 of the Sale of Food and Drugs Act, 1875, inasmuch as the appellant had asked for "milk" and got "milk," but milk which had been skimmed. The magistrate expressed it as his opinion that s. 9 was the section which applied to what the appellant complained of.

The question for the opinion of the Court was, whether under the circumstances the magistrate was right in dismissing the summons.

Day, for the appellant. Milk from which the cream has been removed is not of the nature, substance, and quality of "milk" within the meaning of s. 6 of the Sale of Food and Drugs Act, and, when a purchaser demands "milk" but is supplied without notice with skimmed milk, an offence is committed under that section.

[MATHEW, J. Does "milk" as a term of trade necessarily mean milk from which none of the cream has been removed?]

It is so contended.

No counsel appeared for the respondent.

MATHEW, J. I agree with the decision of the magistrate to the effect that on the facts proved there was no offence shewn under s. 6 of the Food and Drugs Act. What the purchaser was supplied with was milk, although it had been skimmed, and it does not seem to me to have been shewn that what was so supplied was other than what, according to the ordinary use of the term, a purchaser might reasonably have expected to get from the vendor under the designation of "milk." With regard to the question whether there was an offence within s. 9 of the Act it is unnecessary to express an opinion.

DAY, J., concurred.

Appeal dismissed.

Solicitor for appellant: *W. R. Francis, for Smallpeice & Sons.*

E. L.

THE ATTORNEY GENERAL OF THE DUCHY OF LANCASTER, INFORMANT; THE DUKE OF DEVONSHIRE, DEFENDANT.

July 5; *Dec.* 13, 15, 20.

Duchy of Lancaster, Attorney General of—English Information, Right to exhibit.

It is not competent to the Attorney General of the Duchy of Lancaster to exhibit an information in the High Court of Justice, and the Court will order an information exhibited by him to be taken off the file on the application of the defendant even after answer put in by the defendant.

APPLICATION that the information exhibited in the case should be ordered to be removed from the file, and all further proceedings stayed on the ground that the same was not exhibited in the name of her Majesty's Attorney General, and that the informant was not authorized or entitled to file such information on behalf of her Majesty.

The information, which was filed on the 22nd of December, 1881, was exhibited by Henry Wyndham West, Esq., Q.C., the Attorney General of her Majesty's Duchy of Lancaster, appointed by her Majesty by letters patent under the seals of the duchy and county palatine of Lancaster.

It prayed that it might be declared that her Majesty was from the death of the late King William IV. till the filing of the information seised in right of her Duchy of Lancaster of the reversion in fee of certain gritstone and other stone in Fairfield, in the county of Derby: and that the defendant might be ordered to render an account of gritstone and other stone raised or taken in or from certain quarries in Fairfield under a certain demise made by William IV. whereby the hundred and manor of High Peak, in the county of Derby, was demised to the then Duke of Devonshire, and of the expenses of getting the same, and of all royalties and rents received by the defendant for and in respect of the gritstone or other stone so raised or taken since January 17, 1858.

The patent of the Attorney General of the duchy constituted him such Attorney General "in all and singular suits, complaints, businesses, matters, and causes in all our courts whatsoever and elsewhere concerning the same our Duchy of Lancaster, as well in the parts of our kingdom of Great Britain called England as in the parts of Wales, or belonging unto us by reason of our said duchy." The defendant had filed an answer to the information on the 1st of July, 1882.

The facts appearing on the affidavits, which consisted chiefly of copies of the charters and other records of the Duchy of Lancaster and the patents of former Attorneys General of the duchy, will be sufficiently gathered from the arguments and authorities cited therein and from the judgment.

July 5; Dec. 13, 15. *Wills, Q.C., Mellor, Q.C., Charles, Q.C., Edwyn Jones,* and *Elton,* for the defendant, moved for an order in the terms above mentioned. The Attorney General for the duchy, who is appointed under the duchy seal and not the great seal, cannot exhibit an information in the High Court of Justice. Many ancient precedents in the Placita de Quo Warranto shew that originally the King sued and was sued by original writ in the same way as a subject. See Allen on Royal Prerogative, p. 190; Year Book 22 Edw. 3, 3 b.; 24 Edw. 3, 55 b. The procedure by petition of right against the Crown was established by Edward I., and the method of proceeding by information on behalf of the Crown was not established until the times of Henry VI. and Edward IV. It must be remembered in dealing with this question that the procedure by information was only so established after a long and severe struggle on the part of the Crown with the Commons. In the Rolls of Parliament are recorded many successful petitions against the procedure by information: see Rolls of Parliament, vol. 2 (Edw. III.), p. 239 (19); p. 277 (18); p. 295 (12); p. 320 (33); Rolls of Parliament, vol. 3 (Henry IV.), p. 478 (111); Rolls of Parliament, vol. 4 (Henry V.), p. 156 (25). The charters relating to the Duchy of Lancaster are collected in Hardy's Charters of the Duchy of Lancaster. The first charter under which the Duchy of Lancaster was constituted is a charter granted to Henry Duke of Lancaster in the year 1343 (16 Edw. 3): Hardy's Charters, p. 1. By a subsequent charter of 1351 (25 Edw. 3), Hardy, p. 10, were granted "jura regalia pertaining to a county palatine as freely and entirely as the Earl of Chester is well known to hold them in the county of Chester," and by this charter the duchy courts were created. There were subsequent charters in 1377 (51 Edw. 3), Hardy, p. 32; 4 Co. Inst. 204; in 1378 (2 Rich. 2), Hardy, p. 62; in 1390 (13 Rich. 2), Hardy, p. 65. By a charter made in 1399 (1 Hen. 4), Hardy, pp. 102, 137, 138; 4 Co. Inst. 205, the duchy and its franchises were to be held by King Henry IV. and his heirs separate from the Crown, and it is provided that the jura regalia shall be exercised by such officers as were wont to be had in the same duchy. It is well known matter of history that Henry IV., feeling doubtful of his title to the Crown, wished to keep the estate in the duchy separate from the Crown.

In 1461, when Edward IV. came to the throne, by an Act of Parliament a fresh charter was granted (Hardy, pp. 279–281), by which the duchy was incorporated, and was united in possession with the Crown, being granted to the King and his heirs being Kings of England perpetually, and it was provided that the county of Lancaster should be a county palatine, and that such county palatine should form parcel of the duchy, and that there should be a seal of the county palatine and a seal of the duchy.

The grant of jura regalia to the duchy can only apply within

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ATTORNEY GENERAL OF DUCHY OF LANCASTER *v.* DUKE OF DEVONSHIRE.

the duchy and not outside, and therefore it is contended that the Attorney General for the duchy as such could have no right to file an information in the superior courts. About this time, as already stated, the procedure by information ex-officio was springing up and becoming part of the law of the land. The notorious Empson was then Attorney General for the duchy. The patent by which he was appointed is dated 17 Edw. 4, 1477, and is in substantially similar terms to that of the present Attorney General for the duchy. It appoints him Attorney General for the duchy "in all and singular suits, plaints, matters, causes, and businesses in whatsoever courts of the king, and elsewhere concerning the king's same duchy, as well in his realm of England as in the parts of Wales, or to the king by reason of his said duchy belonging or appertaining."

Apparently, however, it needed an Act of Parliament to give the Attorney General for the duchy this power of exhibiting informations in the superior courts, for by 22 Edw. 4, Hardy, p. 337, the power of exhibiting an information out of the duchy is expressly given to the duchy Attorney General; but by the statute 1 Rich. 3, which is not printed in Hardy's collection, the Act of 22 Edwd. 4 was repealed, on the express ground that it was to the injury of the subject. The inference from the legislation is irresistible, that without an Act of Parliament the patent could not give this power.

It is contended that the history of the thing as appearing from the Parliament Rolls shews that the proceeding by information was from the first resisted as unconstitutional and detrimental to the subject, and, though certain sorts of information in certain cases ultimately took root in our law, and became established, there is no sufficient authority to shew that an information by the duchy Attorney General in the Exchequer became lawful. On the contrary, the statute book clearly points to the opposite conclusion.

In 1 Hen. 7 an Act was passed on the accession of that king resuming many possessions of the Crown and the duchy which had been alienated. During the space of thirty or forty years after that we find certain changes in the form of the letters patent granted to the Attorneys General of the duchy, and some of the patents during that period are similar to Empson's, but then they assume the form which has been continually followed until the letters patent granted to the present Attorney General in 1880. In the form used prior to 1880 is always some such expression as "in whatsoever our courts and elsewhere within the same our Duchy of Lancaster." In 1880 the patent was made to revert to a form substantially identical with that of Empson's patent.

There are many instances in the records of informations filed by the Attorney General of the realm in a superior court in duchy matters. There is no instance of such an information filed by a duchy Attorney General. The Year Books, 6 Hen. 4, p. 4, pl. 2, 21 Edw. 4, p. 60, pl. 17, 26 Hen. 8, p. 9, pl. 3, are authorities to shew that the grant of jura regalia to the duchy only applies to the enjoyment of jura regalia within the duchy.

The provisions of the Crown Suits Act, 28 & 29 Vict. c. 104, seem to be framed upon the assumption that no such power as that now claimed by the Attorney General of the duchy existed, because the 3rd sub-section of the 5th section of the Act applies only to her Majesty's Attorney General and the Attorney General of the Prince of Wales and Duke of Cornwall, and, though the Act expressly mentions the Duchy of Lancaster, the Attorney General of that duchy is not mentioned in that sub-section. By s. 6 an information means an information styled an English information exhibited in the Court of Exchequer in the name of the Attorney General or of the Attorney General of the Prince of Wales and Duke of Cornwall as informant. Therefore, if the informant's contention is correct, there is a species of information to which the Act does not apply, and which will not be regulated by its provisions, and the defendant is consequently relegated to an unknown procedure.

There is no precedent to be found of an information by the Attorney General for the county palatine of Chester in the superior courts, though there are many of such informations in the palatine courts. They also cited *Rex* v. *Berchet.* (1)

West, Q.C., Davey, Q.C., and *Trevelyan,* shewed cause. The terms of the patent of the Attorney General for the duchy were altered in 1880 to enable the Attorney General of the duchy

(1) 1 Show. 106, 114.

to proceed in the Queen's Bench Division, there being certain practical inconveniences arising from the mode and incidents of procedure in the Duchy Courts. The terms of the successive charters of the duchy shew that from the time of Henry IV. to that of Edward IV. the policy of the kings always was to keep the duchy separate from the Crown both in title and government, and to prevent the merger of the duchy in the Crown. In the parliamentary charter of Edward IV. (Hardy, pp. 279, 281), however, the duchy was settled upon the heirs of the King, being kings of England, but the government and administration of the duchy, as the private estate of the Crown, was still carefully kept separate from that of the realm. By that Act the county of Lancaster was declared to be a county palatine and made parcel of the duchy. In *Fisher* v. *Batten* (1) Lord Hale says, "The possessions of the Duke of Lancaster were not made a ducatus until 2 Hen. 5; in the Parliament Roll for that year it is entered quod sigilla pro ducatu Lancastriæ allocentur, and that it should be governed per ministros ducatus. By the Parliament Roll 39 Hen. 6, amongst the Tower records, it appears that there was appointed a chancellor of the duchy and an attorney, auditor, a steward, and a general receiver; also a chancellor and the like officers for the county palatine." Till the time of Edward IV. the Attorney General of the duchy was never called the King's Attorney General of the duchy. From that time downwards it will be found that he is always styled the King's or Queen's Attorney General of the duchy. Judicial cognizance has always been taken by all the courts of the duchy seal. It is contended that the Attorney General of the duchy is the King's Attorney General in all courts for the purposes of the duchy. The fact that there are no records of English informations by the duchy Attorney General prior to Elizabeth is immaterial, for neither are there any records of such informations by the Attorney General during such period, the records of the Equity side of the Exchequer prior to the time of Elizabeth being lost. With regard to the subsequent period down to 1880, it is possible that the form of the patents which during that period contained the words "within the said duchy" was the cause of there being

(1) 1 Vent. 155.

no such information by the duchy Attorney General. But it does not follow that the Queen cannot create an Attorney General for the duchy for all matters relating to the duchy in all courts, and that under the present form of patent there cannot be such an information. Since the year 1880 in the case of *The Queen* v. *Dunn* (1) the duchy Attorney General applied to the Court after notice to the Attorney General, who made no objection to the application, to order the issue of a writ of subpœna ad respondendum by information against Thomas Dunn at the suit of the Attorney General of the duchy, thus raising the very same point as is now raised, and the Exchequer Division granted the application.

[DAY, J. That was an ex parte application, and there was no argument on the other side.]

The argument submitted to the Court was, that the Queen could appoint any person to be her attorney to represent her anywhere in particular matters, and that the terms of the patent clearly did appoint the Attorney General of the duchy to represent her in any court in relation to duchy matters.

[DAY, J. When the nature of an information is considered, it seems to me doubtful whether the Crown can appoint anybody to go into Court and inform other than the Attorney General of the realm, who is now the constitutional officer for the purpose.]

The Queen by her prerogative may sue in what Court she pleases: *Burgess* v. *Wheate* (2); 4 Inst. 15, 17; Com. Dig. tit. "Prerogative," D. 85; *Cawthorne* v. *Campbell*. (3) She may also appoint, it is submitted, whom she likes to represent her in any court. It is the Queen who really informs and has the right of informing, not the mere officer who lays the information: *Rex* v. *Wilkes* (4); *Rex* v. *Gregory*. (5) What difference can it make to the subject, if there is a right in the sovereign to proceed by information, by whose mouth the Court is informed?

In *Rex* v. *Wilkes* (6) the question was whether an information by the Solicitor General was good without alleging that when it was exhibited the office of Attorney General was vacant, and it was argued by De Grey and Thurlow in support of the judgment below that an information is the suit of the King, and that it would be difficult to assign a reason why his Majesty should not have equal liberty with the subject of commencing and prosecuting his suits by those persons whom he thinks fit to confide in and employ. The House of Lords seem to have approved the argument, for they affirmed the judgment. In the same case (1) Wilmot, C.J., in delivering the opinion of the judges to the House of Lords, says that informations are not the suits of the Attorney General but of the King, and that the arguing that the Attorney General only and no other officer was entrusted by the constitution to sue for the King, either civilly or criminally, is a fundamental mistake: that the Attorney General is entrusted by the King and not by the constitution; that it is the King who is entrusted by the constitution; that the Attorney General is but an attorney, though to the King, and in no other and different relation to him than any other attorney hath to his employer; that the name means no more than attorney generally employed to sue and defend for the King; and he cites authorities which appear to shew that the King might at any time appoint a special attorney for a particular suit or class of suits. At the utmost it is a question between the Crown and the officer laying the information whether he is duly authorized, and it does not lie in the mouth of the defendant to say that the Court has been informed by her Majesty through the wrong person, at any rate after such a lapse of time as has taken place here, and after an answer has been filed, as has been done in this case.

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(1) Not reported.
(2) Eden. 189.
(3) 1 Anstr. 210.
(4) 4 Burr. 2553, 2555; 4 Bro. P. C. 360.
(5) 3 Keb. 127.
(6) 4 Bro. P. C. 360.

[MATHEW, J. Assume that an information was filed by a mere volunteer, a person having no authority whatever; surely the fact of the defendant having filed an answer would not oblige the Court to act on the information when informed by him how the matter stood?]

This is not the case of a mere volunteer. The patent in this case expressly gives the authority.

[MATHEW, J. The patent is not under the great seal—it is only under the duchy seal. Can we recognise the appointment of an attorney by the Crown under that seal in this Court?]

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(1) 19 State Trials, 1120, 1128.

All Courts take cognizance of the duchy seal: 4 Inst. c. 36, p. 206; *Fleetwood* v. *Pool* (1); *The Case of the Duchy of Lancaster* (2); *Alcock* v. *Cooke* (3); and this being a duchy matter the duchy seal was the proper seal to use.

The royal prerogative can only be taken away or diminished by statute. If the King had originally, before the form of patent was introduced confining the authority of the duchy Attorney General to the duchy courts, the power of appointing an Attorney General for the duchy to represent him in the superior courts in duchy matters, such power could not be lost by mere non-user. The earlier patents granted and the records of the duchy shew that before that time the king used to appoint Attorneys General and special attorneys for the duchy to represent him in proceedings not only in the duchy courts but in the superior courts in duchy matters. [They cited here an extract from the Lord Treasurer's Remembrancer's (Exchequer) Memoranda Roll, Mich. 1 Hen. 4, roll 15 d, concerning the enrolment of letters patent from the King under the duchy seal to John Leventhorpe, assigning him "to be our Attorney General in all pleas or plaints touching the Duchy of Lancaster and our earldomes of Hereford and Northampton and our other lands and possessions whatsoever which belonged to us before our coronation in our Courts as well in our Chancellery, our Bench and the Common Bench, our Exchequer and Receipt," and numerous extracts from the duchy records, being appointments of special attorneys for the duchy in the Court of Chancery, King's Bench, and Exchequer, down to the time of Charles I., also extracts from the Lord Treasurer's Remembrancer's (Exchequer) Memoranda Roll, Easter, 9 Hen. 4, roll 16 d, and Plea Roll (Exchequer of Pleas), Hilary, 15 Hen. 6, m. 25, being records of proceedings by such special attorneys.]

It is a fallacy to distinguish between the right to exhibit an information and the right to take any other proceeding for this purpose. It may be that the right to exhibit informations only became established in the times of Henry VI. and Edward IV., but that right when established is the right in substance of the King, not of any particular official, and the King may exercise it by his attorney like any other right.

(1) 1 Hardr. 171. (2) Plowd. 212. (3) 5 Bing. 340.

With regard to the Crown Suits Act, the case of an information by the duchy Attorney General very probably escaped notice, or possibly the duchy Attorney General may be included in the term "Attorney General" for the purposes of the Act.

Mellor, Q.C., in reply, cited Price's Practice of the Exchequer, ed. 1830, p. 432; *Cotton* v. *Johnson* (1); *The Saffron Walden Case* (2); *Astill* v. *Clarke.* (3)

Cur. adv. vult.

Dec. 20. The judgment of the Court (Mathew and Day, JJ.) was delivered by

MATHEW, J. This was an application on the part of the defendant to remove from the file an information exhibited by the Attorney General of the Duchy of Lancaster to compel the defendant to account for certain royalties and rents alleged to be payable in respect of property held by him within the duchy.

The ground of the application was that the right to file such an information belonged exclusively to the Attorney General of the realm, and that the proceeding of the Attorney General of the duchy was an attempt to create a new remedy against the subject without the sanction of Parliament.

In answer to the application the Attorney General of the duchy relied upon letters patent issued to him under the seals of the County Palatine and Duchy of Lancaster, which empowered him to represent the Crown in the following terms, "in all and singular suits, complaints, businesses, matters, and causes in all our courts whatsoever and elsewhere concerning the same our Duchy of Lancaster, as well in the parts of our kingdom of Great Britain called England, as in the parts of Wales, or belonging unto us by reason of our said duchy."

In order to deal with the question it is not necessary to refer at length to the well-known history of the duchy as set forth in 4 Co. Inst. c. 36. It is sufficient to say that by letters patent of 25 Edw. 3, jura regalia were, with the exceptions therein specified, conferred within the duchy upon the Duke of Lancaster. Under this patent the courts of the duchy were constituted and the offices of Chancellor and Attorney General of the duchy were created. By a further charter of 1 Hen. 4, which confirmed former charters, it was directed that the duchy should be held by the King and his heirs separate from the Crown, and to remain and descend as before his accession to the Crown. By charter 4 Hen. 5, it was provided with the sanction of Parliament that no grants relating to the duchy passed under any other than the seal of the duchy should be valid. By charter 1 Edw. 4 it was directed that the duchy should be incorporated and should be held by the King and his heirs, being Kings of England.

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(1) 3 Salk. 110.

(2) Moor. 159.

(3) 2 Lutw. 1233.

The records referred to in the course of the argument and exhibited to the affidavits filed in the cause contain specimens of the letters patent issued up to this time to the attorneys of the duchy. In some authority was given to do "whatsoever to the office of Attorney General duly pertains." In one, dated 1399, the Attorney General was empowered to represent the Crown in all the King's courts.

By statute 22 Edw. 4, the right would appear for the first time to have been conferred upon the Attorney General of the duchy to file an information in any of the King's courts. By that Act it was provided that, "if the Kyng's Attourney Generall of his said Duchie of Lancaster for the tyme beyng put a bill into eny of the Kyng's Courts by wey of enformation, shewying in the same to the Court what and wherin the Kyng or eny other to his use shuld be unlawfully hurted or wronged in any thing to hym apperteyning in the right of the same duchie, that forthwith at the request of the same attourney the justices of the same Court, where the said bill and enformation shall rest, shall have power uppon the same to awarde processe by capias and to make other such processes into every countie of Englond as by the cours of the lawe shuld be made upon that mater if ther were therupon due originall sued by th' ordre of the lawe or such processe for the same as shuld be awarded for the Kyng for like offence doon to hym in the right of his Corone."

The proceeding by way of information had for some time previously been had recourse to in the interest of the Crown, but under continual protest from those against whom it had been employed as an excess of the prerogative, and in the Rolls of

Parliament down to the time of Henry V., many instances will be found where such protests against informations were made successfully. The statute book shews how sturdily the contest was afterwards maintained. But nevertheless two kinds of information did ultimately take root in the law; criminal informations filed in the Queen's Bench, and informations in Chancery (like the present) on the Equity side of the Exchequer. With respect to the first, since the 4 & 5 Wm. & M. the right of proceeding without the leave of the Court has been finally confided to the Attorney General of the realm, who as a member of the executive government is responsible for the manner in which his duties are performed. With respect to the second, it is a significant fact that the counsel for the duchy have been unable to point to a single instance of an information by any other person than the same high official.

In the reign of Edward IV., Sir Richard Empson was appointed Attorney General for the duchy, and the statute 22 Edw. 4 would seem to have been intended to arm him and his successors with new powers against those by whom the rights of the King as Duke of Lancaster were supposed to have been infringed. The statute, however, was not suffered to remain in operation for more than a year, for by 1 Ric. 3 it was repealed in the following terms: "The Kyng notwithstandyng that he conceyveth the said Acts to be to his greate profite and availe and to the grete hurt and thraldome of his subgietts, havyng more affection to the comon wele of this his realme and of his subgietts than to his own singler profitt by the advise of his Lordes Spirituelx and Temporelx and the Comons in this present Parliament assembled and by auctorite of the same hath ordeigned enacted and stablished that the foresaid Actes and every of theym be annulled repeled and of no force ne effect; and that his said subgiets stande and be at their liberties and freedom in like fourme as they were before the makyng of the same Actes." Empson continued in office in the reign of Henry VII., under letters patent which appointed him "Attorney of our duchy in all and singular suits, plaints, matters, causes and businesses in whatsoever courts of the King and elsewhere concerning the King's same duchy." There is no record during the reign of any proceeding in the

King's Courts by information filed by the Attorney General of the duchy. From what is known of the history of the times, and from the fact that letters patent were afterwards granted by Henry VII. to William Eryngton in the form of Empson's patent, it may be that the proceedings condemned by the Act of Richard III. were continued. It is, however, matter of history that at the beginning of the reign of Henry VIII. the modes of instituting proceedings for the King which had previously been adopted by Empson were abandoned, and popular indignation was to some extent allayed by the execution of Empson on an unfounded charge of high treason; and other means were subsequently devised for providing for the necessities of the Crown which were more acceptable to the King's subjects than those which had been made use of in the time of his predecessors. The letters patent granted in the 10 Hen. 8 to John Hales appointed him Attorney General in the courts "within the duchy," and were thus, as it would seem, brought into harmony with the law. This form has been followed in the letters patent granted ever since 1519 down to 1880. From the searches made into the records, the results of which were fully brought before the Court by counsel on either side, two very important points appear to be established. On the one hand, from the year 1519 down to the year 1880 there is no instance of an information filed in the King's courts in any matter concerning the duchy by the duchy Attorney General. And on the other hand in every reign down to the year 1874 the informations filed in the superior courts in duchy matters were exhibited by the Attorney General of the realm.

Further, by the Crown Suits Act, 28 & 29 Vict. c. 104, the right to file such an information as this seems clearly to be treated as belonging to the Queen's Attorney General, and not to the Attorney General for the duchy.

In the year 1880, for reasons which it must be said are in no way open to censure, it occurred to the present Attorney General for the duchy that it would be convenient to alter the form of the letters patent; and her Majesty was pleased, in accordance with the advice which was given her by the officers of the duchy, to permit the suggested alteration to be made. The patent which had been granted in the first instance to Mr. West in the year 1859 was cancelled, and new letters patent were prepared, substantially in the form in which they had been granted to Empson in the reigns of Edward IV. and Henry VII. The first observation to be made on those letters patent is that in terms the right to file informations in the royal courts is not given, and, if it were intended that the grantee should have the power of representing the Crown with reference to duchy matters which had previously been exercised by the Queen's Attorney General, it seems probable that this intention would have been plainly stated. If the argument addressed to us by the Attorney General for the duchy is well founded, he is for all purposes connected with the duchy in the position of the Attorney General of the realm. If this be so he would be entitled to file an ex-officio information. Again, the letters patent do not recite those granted to the then Attorney General, Sir John Holker, and do not state whether the rights of the Attorney General of the duchy are co-ordinate or exclusive. Further the patent does not refer to the Crown Suits Act, and no provision is made for the procedure upon duchy informations.

The rule for dealing with grants from the Crown under such circumstances is laid down in the case of *The Queen* v. *Eastern Archipelago Co.* (1) If the grant be framed in terms so uncertain that it cannot be applied with that precision which grants from one so especially representing the public interest ought in reason to have, or, if the grant reasonably construed would work a wrong or something contrary to law, it will be either wholly void or restrained according to circumstances, with the view of effectuating what must be presumed to be the real intention of the grantor. We cannot suppose that it could have been meant by such means as the grant of the letters patent in question to require the judges to create a new legal remedy of so formidable a character. There is no precedent so far as we are aware in constitutional times for such an alteration of the procedure of the Courts otherwise than by statute. The interpretation which the letters patent must receive does not therefore justify the present proceeding by the Attorney General of the duchy; and it appears

(1) 1 E. & B. 310; 2 E. & B. 857.

to us that we have no more power to sanction what has been done than we should have to permit a civil action to be commenced by a writ of attachment or a capias or a subpœna.

Such an information as this can only be filed by the Attorney General of the realm, and the application must therefore be granted.

Application granted.

Solicitor for the informant: *F. Whitaker.*

Solicitors for the defendant: *Curry, Holland, & Currey.*

E. L.

Dec. 1.

[IN THE COURT OF APPEAL.]

THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY *v.* THE DENABY MAIN COLLIERY COMPANY.

Railway Company—Carrier—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), s. 90—"*Passing only over the same Portion of the Line*"—"*Under the like circumstances*"—"*In favour of or against any particular Person*"—*Unequal Tolls—Group Rates—Undue Preference—Railway and Canal Traffic Act,* 1854 (17 & 18 *Vict. c.* 31), *ss.* 2, 3, 6—*Action for Breach of Railway and Canal Traffic Act,* 1854, *whether maintainable.*

No action will lie in respect of any breach of the provisions of the Railway and Canal Traffic Act, 1854, s. 2.

Judgment of the Queen's Bench Division (13 Q. B. D. 674) as to this point affirmed.

A railway company carried coals eastwards to various towns from a group of collieries situate at different points along their line, and charged one uniform set of rates in respect of the carriage to all the collieries comprised in the group. In an action for overcharges by the owners of the colliery lying furthest eastwards:—

Held, that inasmuch as the terminus of the transit over the company's line differed with respect to each colliery comprised in the group, the company had not contravened the provisions of the Railways Clauses Consolidation Act, 1845, s. 90, and therefore were not liable in the action.

Judgment of the Queen's Bench Division (13 Q. B. D. 674) as to this point reversed.

A railway company carried coal from certain collieries, including the D. colliery, situate in the Y. coalfield, to the port of G., where a line of steamers called which traded to the West Indies; in order to introduce the coal carried by them to the West Indian market, the railway company agreed to allow B. 8*d.* per ton in respect of all coal shipped on board the steamers in order to be carried to the West Indies. The railway company agreed also to allow B. 6*d.* per ton upon all coal shipped for certain ports, in view of the anticipated advantage to themselves by the increased tonnage to be carried over their line. The owners of the D. colliery also sent coals over the line of the railway company to the same port of G., but not for shipment to the West Indies or to the ports above-mentioned, and claimed to recover from the railway company overcharges in respect of the coal thus sent by them, on the ground of the allowances of 8*d.* per ton and 6*d.* per ton made to B.:—

Held, as to the coals carried by the railway company for B. from the Y. coal-field other than those coming from the D. colliery, that the termini of the transit from the collieries being different, the owners of the D. colliery could not recover for overcharges:—

Held, as to the coals carried by the railway company for B. coming from the D. colliery, on the authority of *Great Western Ry. Co.* v. *Sutton* (Law Rep. 4 H. L. 226), and *London and North Western Ry. Co.* v. *Evershed* (3 App. Cas. 1029), that the railway company, by making the allowances of 8*d.* per ton and 6*d.* per ton, had contravened the Railways Clauses Consolidation Act, 1845, s. 90, but that the owners of the D. colliery had not proved any damage by reason of the allowances to B., and therefore could not recover from the railway company for overcharges.

A railway company were carriers of coal for B. and J., who were coal merchants, to G. The trucks with the coals intended for them upon the arrival at G. were taken direct to their yards, and it cost the railway company less to deliver the trucks straight into the yards of B. and J., than to keep the trucks in the goods-yard of the company until the trucks should be unloaded. The railway company thereupon allowed B. sometimes 2*d.* and sometimes 6*d.* per ton, and J. 4*d.* per ton. B. and J. obtained coals from many collieries situate upon the line of the railway company, and the railway company, as might be convenient to them, returned the trucks of B. and J. to any colliery with which they had dealings. It was cheaper for the railway company to be at liberty to send the trucks at their pleasure to any colliery with which B. and J. had dealings than to be compelled to return them to a particular colliery, and therefore they allowed B. and J. a rebate of 2 per cent. upon their respective nett debits. The saving to the railway company did not adequately represent the allowances of 6*d.* or 4*d.* per ton, or the rebate of 2 per cent. The owners of a colliery also sent their coals along the line of the railway company to G., but their trucks were kept in the goods-yards of the railway company until they were unloaded, and after being unloaded were returned straight to the colliery. The owners of the colliery having claimed to recover from the railway company for overcharges in respect of the allowance of 6*d.*, 2*d.*, and 4*d.* per ton, and of the rebate of 2 per cent.:—

Held, that the railway company carried for B. and J. under circumstances different from those under which they carried for the owners of the colliery, and that the latter were not entitled to recover in respect of the alleged overcharges.

SPECIAL CASE.

Action for the balance of an account for carriage of the defendants' coal by the plaintiffs upon their railway. The writ of summons was issued on the 14th of December, 1880.

Set-off and counter-claim for overcharges and excessive and unequal rates charged by the plaintiffs during a period of six years before the action was brought, against the defendants in respect of the carriage of the defendants' coal over the plaintiffs' railway, and over a canal belonging to the plaintiffs, whereby the plaintiffs were alleged to have unduly favoured other colliery owners and subjected the defendants to an undue and unreasonable disadvantage, contrary to the provisions for equality contained in the Railways Clauses Consolidation Act, 1845, s. 90, and the Railway and Canal Traffic Act, 1854, s. 2. The defendants claimed 30,000*l.* in respect of their set-off and counter-claim, and alternately 30,000*l.* damages.

The action was referred with power to the arbitrator to state a special case. He accordingly stated the following case, divided into two parts. The following are the portions of it material for the report of the proceedings in the Court of Appeal:—

PART I.

The defendants were colliery owners, carrying on their business at the Denaby Main Colliery, near Doncaster. It was the business of the defendants to raise and sell coals for delivery in different parts of the kingdom and abroad. They dealt only in coals raised from their own mines. Their colliery was situated on the line of the plaintiffs' railway, and connected with it by sidings. The defendants' colliery had no direct communication with any line of railway except that of the plaintiffs. The defendants sold coal at Grimsby. Amongst the customers of the defendants were certain coal merchants named respectively Bannister and Josse & Co., and carrying on business at Grimsby. They bought coal, not only of the defendants, but of other owners of collieries, both in the South Yorkshire coalfield and elsewhere. The plaintiffs' railway was the only railway leading from the South Yorkshire coalfield (in which the defendants' colliery was situated,) to Grimsby. The plaintiffs carried coal for Bannister and for Josse & Co., as well as for the defendants. The plaintiffs carried coal for the defendants, for Bannister, and for Josse & Co., from the Denaby Main Colliery to Grimsby, for shipment there.

From February, 1874, to December, 1876, the plaintiffs made to Bannister an allowance or rebate of 8*d.* per ton from the published rate of carriage in respect of all coal shipped by certain steamers known as the "Hamburgh American steamers." The Hamburgh and American Steam Shipping Company had a line of steamers to the West Indies. The agents of the plaintiffs induced them to make Grimsby a calling place for their ships. They were accustomed to use Welsh coal. It was ascertained by the plaintiffs that if the Hamburgh company could get the South Yorkshire coal at a reduction of 10*d.* or 1*s.* on the then current prices, they would buy coal at Grimsby in place of the Welsh coal. To enable this to be done, and in the hope that South Yorkshire coal might thus be introduced to the West Indian market, the plaintiffs agreed to make to Bannister an allowance of 8*d.* per ton upon the rates of carriage of South Yorkshire coal from any colliery in the South Yorkshire coalfield to Grimsby (including the Denaby Main Colliery), in respect of all coal shipped by the Hamburgh American steamers. They did, in fact, make to Bannister the above-mentioned allowance on all the coals so shipped, but there was no evidence to shew from what collieries in the South Yorkshire coalfield the coal came. They gave no public or other notice that they were doing so, or that they would make similar allowances to other persons under similar circumstances. There was no contract on the part of Bannister that any definite quantity should be shipped, and the services performed by the plaintiffs in respect of the above-mentioned coal were identical with those performed by them in respect of any other coal shipped at Grimsby. They did, in fact, carry for the defendants between February, 1874, and December, 1876, large quantities of coal for shipment at Grimsby, in respect of which they charged and received the full rate. The last-mentioned coals were carried under the same circumstances as the coals shipped by the Hamburgh American steamers. The allowance in question was not known to the defendants at the time it was made, nor for several years afterwards. The allowance was made to Bannister only in respect of coal shipped on board the Hamburgh American steamers, and not in respect of any other coal carried by the plaintiffs for him for shipment at Grimsby. After December, 1876, the Hamburgh-American steamers ceased to call at Grimsby, and the allowance thus came to an end.

The coal sent to Grimsby from the various South Yorkshire collieries was partly for shipment, partly for land sale at Grimsby. There were different rates for the carriage according as coal was for shipment or for land sale. The several rates charged from time to time during the period covered by this action for the carriage of coal for shipment and land sale respectively, were as follows:—From December, 1874, to the 30th of June, 1876, for land sale, 4*s.* 2*d.*, for shipment, 3*s.* 8*d.*; from the 1st of July, 1876, to July, 1878, for land sale, 4*s.* 2*d.*, for shipment, 3*s.* 4*d.*; from August, 1878, to June, 1879, for land sale, 3*s.* 10*d.*, for shipment, 3*s.* 4*d.*; from July, 1879, to December, 1880, for land sale, 3*s.* 10*d.*, for shipment, 3*s.* 1*d.* The above charges were made to every one for whom the plaintiffs carried coal from the South Yorkshire coalfields, except Bannister and Josse & Co. Many years previously, the plaintiffs had agreed with Bannister to charge him in respect of coal for land sale the same rates as in respect of coal for shipment. The shipment rate was at that time 3*s.* 8*d.*, and during the whole period covered by this action, Bannister continued to be charged at the rate of 3*s.* 8*d.* for land sale coal, thus giving him an allowance at one time of 6*d.* and afterwards of 2*d.* per ton. From July, 1876, to July, 1878, the plaintiffs made Josse & Co. an allowance of 4*d.* per ton upon the rates charged in respect of their land sale coal. Land sale coal for persons other than Bannister and Josse & Co. had to be taken into the goods yard of the plaintiffs, and there placed upon sidings and kept until taken away by the consignee. Charges for the occupation of sidings were made by the plaintiffs, after the trucks had remained two days upon the siding. Bannister and Josse & Co. had coal yards of their own in Grimsby Town connected with the plaintiffs' line, and land sale coal for them was during the whole period covered by this action delivered directly into their yards, and upon this delivery the plaintiffs had nothing further to do with it. It was to the interest alike of Bannister and Josse & Co. and of the defendants to keep the trucks in which coals were delivered, at Grimsby as short a time as possible, but the fact, that Bannister and Josse & Co. had their own yards, enabled them to return the trucks consigned to them upon the whole more promptly than the defendants could. Bannister and Josse & Co., and not the colliery owner, paid the carriage upon all coal delivered at their respective yards. It cost the railway company less per ton to carry coals to Grimsby Town for delivery to Bannister and Josse & Co. than for delivery there to the defendants. The plaintiffs did not shew to the satisfaction of the arbitrator, that the allowance of either 6*d.* or 2*d.* a ton on all coal carried to Grimsby for Bannister, or that of 4*d.* a ton on all coal carried to Grimsby for Josse & Co. was adequately represented by the saving to the plaintiffs. No calculation or estimate of the amount of the saving appeared to have been made when the allowance was agreed upon, or at any other time. There was no difference in the amount so saved when the allowance to Bannister was 6*d.* and when it was 2*d.*, nor was any reason given why a different amount had been fixed upon as the allowance to Josse & Co. The arrangement to make an allowance of this description to Bannister was made many years before upon the occasion of his establishing a yard of his own, into which the coal might be delivered. The allowance to Josse & Co. began in 1876: the reason for making it was not otherwise explained than that it had been made "at their earnest solicitation."

During the whole of the period covered by this action, the plaintiffs had allowed to Bannister and Josse & Co. a rebate of 2 per cent. upon their respective nett debits, in respect of coal traffic of every description (and whether in the plaintiffs' or in owners' waggons,) carried for them. This allowance had not been made to any one else. The plaintiffs made no separate charge for the return of empty waggons. Both Bannister and Josse & Co. owned a large number of waggons and dealt with many collieries. The defendants owned a much larger number of waggons than either Bannister or Josse & Co., and a large quantity of the coal purchased by Bannister and Josse & Co. from the defendants was carried in the defendants' waggons. Both Bannister and Josse & Co. allowed the plaintiffs to take any of their empty waggons to any colliery with which Bannister and Josse & Co. respectively dealt, to which it might suit the plaintiffs to send them, no matter from what colliery they came when loaded. The plaintiffs could not return the empty waggons of the defendants to any place other than the Denaby Main Colliery. The above statements applied both to land sale coal and to coal for shipment. By reason of the matters above stated the coal carried for Bannister and Josse & Co. during the period covered by the allowances aforesaid, taken as a whole and including in the term "carriage" the dealing with empty waggons, was carried more economically to the plaintiffs than coal carried for the defendants. The plaintiffs had not proved to the satisfaction of the arbitrator that the allowance of 2 per cent. upon the nett debits was adequately represented by the saving to the plaintiffs, and there was no necessary relation between the two values.

Between July, 1874, and March, 1880, the plaintiffs allowed to Bannister 6*d.* per ton on all coal shipped by him from Grimsby to English ports, south of Harwich. There was little trade of this kind, and Bannister undertook to develop the trade, to provide vessels, and to run the risks incidental to the working of the traffic, and in consideration of his doing so, and in view of the anticipated advantage to the company by the increased tonnage to be carried over their line, the plaintiffs agreed to give him 6*d.* per ton upon the number of tons shipped. This was equivalent in amount to an allowance of 6*d.* per ton upon the carriage account in respect of the coals in question. But the arbitrator found that the arrangement was bonâ fide, and was not made with the object of giving a preferential rate of carriage to Bannister. In the company's books the sums due were credited every quarter of a year to Bannister under the description of "agency commission for shipment of coal by coastwise vessel to ports south of Harwich." No opportunity was afforded to the public in general or to other persons sending coal by the plaintiffs' railway to Grimsby of earning the like payment by the like services. The average amount of coal subject to this arrangement was about 15,000 tons per annum.

The allowances of 6*d.*, 4*d.*, and 2*d.* to Bannister and Josse & Co. in respect of the carriage of coal for land sale, the allowance of 2 per cent. on nett debits, and the payment of 6*d.* per ton on coal shipped from Grimsby to places south of Harwich were unknown to the defendants until they were ascertained from discovery had in the action.

Each of the various allowances made to Bannister and Josse & Co. was sufficient in amount to constitute (if the defendants were entitled to complain of it,) a substantial disadvantage to the defendants in their competition with Bannister and Josse & Co.

The questions arising upon the foregoing statement were whether (1) the allowance of 8*d.* per ton to Bannister upon coal shipped by the Hamburg American steamers; (2), the allowance, which was at one time 6*d.* and at another 2*d.* per ton, made to Bannister, or that of 4*d.* per ton made to Josse & Co., upon coal carried to Grimsby for land sale there; (3), the allowance of 2 per cent. upon the nett debits made to Bannister and Josse & Co; (4), the payment of 6*d.* per ton to Bannister upon coal shipped from Grimsby for ports south of Harwich, constituted breaches of the Railways Clauses Consolidation Act, 1845, s. 90; (5), if either the allowance of 8*d.* per ton to Bannister upon coal shipped by the Hamburgh American steamers, or the payment of 6*d.* per ton to Bannister upon coal shipped from Grimsby for ports south of Harwich was a breach of the Railways Clauses Consolidation Act, 1845, s. 90, upon what principle in either case was the amount of the overcharge to the defendants in this respect to be ascertained?

PART II.

During the period covered by this action, the plaintiffs had one uniform set of rates for the carriage of coal from about forty-eight different collieries to a number of places lying eastward of these collieries, and served by the plaintiffs' railway. These collieries were called "the group," and the rates from them to the places lying to the eastward served by the plaintiffs' railway were called "the group rates." The defendants' colliery was the easternmost in the group, and the distance along the plaintiffs' line of railway between the defendants' colliery and the member of the group furthest from the defendants' colliery was fifteen miles. The group rates comprised the rates from each of the collieries to a great number of towns and places in various parts of England. All coals going from any of the collieries comprised in the group to any of the last-mentioned towns and places must pass the defendants' colliery and go away thence in an easterly direction. Before the 1st of January, 1880, and after the 4th of December, 1880, coal going away to the westward from any of the collieries comprised in the group was charged differing rates according to the distance from the colliery from which it was dispatched to the place of destination. There was no "grouping" for traffic westwards. The defendants' colliery, being the furthest to the eastward of the collieries in the South Yorkshire coalfield, paid the highest rates for coal going west, whilst they paid the same rates as the rest of the collieries in the group upon coals going east. Between the 1st of January, 1880, and the 4th of December, 1880, the rates for carriage of coal westwards from any of the collieries comprised in the group were the same. The bulk of the coals sent from the defendants' colliery had always gone eastwards, but they had also had a substantial traffic westwards.

On the 8th of June, 1880, the defendants applied to the railway commissioners to restrain the plaintiffs from charging the group rates. On the 26th of July, 1880, the railway commissioners gave judgment in favour of the defendants, and prohibited the plaintiffs from charging equal rates between the various collieries comprising the group and places lying to the eastward to which the group rates applied. It was not disputed for the purposes of the special case that the decision of the railway commissioners was right. The plaintiffs had ceased to charge the group rates since the 26th of July, 1880, and had thenceforward carried coals from the various members of the group at differential rates. The rates thus established were in respect of coal carried from the defendants' colliery lower in every instance than the group rates. The defendants had been charged the group rates down to the 26th of July, 1880.

For the purposes of this part of the special case it was to be assumed that the circumstances, under which payments had been made, did not preclude the defendants from opening the accounts.

The defendants contended that the group rates were a violation of s. 90 of the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), and of s. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), and that they were entitled under

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either of these enactments to recover the difference between the amount actually paid by them for carriage of coals and the amount which would have been payable if proper differential charges had been made for carriage of coal from the different members of the group, and not only such differences but damages for breach of the statutory duty. The plaintiffs contested each of the above claims.

The questions for the opinion of the Court were (1) did the group rates constitute a breach of the Railways Clauses Consolidation Act, 1845, s. 90? (2) if so, were the damages of the defendants for the breach of that enactment limited to the amount of overcharges, (and what was the measure of such overcharges,) or could general damages also be recovered? (3) did an action lie for breach of the Railway and Canal Traffic Act, 1854, s. 2? (4) if so, were the damages of the defendants for the breach of that enactment limited to the amount of overcharges, (and what was the measure of such overcharges,) or could general damages also be recovered?

The Queen's Bench Division declared that the matters in questions 1, 2, 3, 4 of Part I. and the group rate in question 1 of Part II. constituted breaches of the Railways Clauses Consolidation Act, 1845, and that the defendants' damages for breach of that enactment were limited to surcharges; and further, that no action lay for breach of the Railway and Canal Traffic Act, 1854, s. 2.

The proceedings before the Queen's Bench Division as to the group rates, and as to the question whether an action lay under the Railway and Canal Traffic Act, 1854, s. 2, are reported in 13 Q. B. D. 674.

Appeal by the plaintiffs and cross appeal by the defendants.

Nov. 19, 20. *Sir F. Herschell, S.G.*, and *Littler, Q.C.* (*C. A. Russell* with them), for the plaintiffs. Sect. 90 of the Railways Clauses Consolidation Act, 1845, relates only to the rates charged for passengers or goods carried over the same portions of the railway. It has no application to the "group rates." This is the first occasion on which it has been attempted to treat that which may possibly be an undue preference as an unequal rate within that enactment. If this attempt be successful, then the Railway and Canal Traffic Act, 1854, was unnecessary. There was sufficient dissimilarity between the circumstances under which the plaintiffs carried for Bannister, and those under which they carried for the defendants, to make s. 90 inapplicable. But even although a breach of that section has been committed, overcharges can be recovered only when the plaintiffs were carrying goods for the defendants on the same day that they were carrying goods for Bannister, for on the other days they could not be charged with carrying goods for the defendants at a higher rate than they were carrying for Bannister. No damages can be recovered. With regard to the Railway and Canal Traffic Act, 1854, the case of *In re Caterham Railway Company* (1) shews that to be an undue preference within that Act by reason of an inequality of charge, the inequality must be in the charge for travelling over the same line or portion of the line; and *Re Nicholson and Great Western Railway Company* (2) is an authority that an arrangement such as was made between the plaintiffs in the present case and Bannister, who supplied the coals for the Hamburg-American Company, would not be contrary to s. 2 of that Act. It may be admitted for the plaintiffs that the intention of a railway company can make no difference as to the question of undue prejudice; but they may always give a preference with a view of protecting their own interests: *In re Oxlade* (3). Further, no action will lie for a breach of the provisions of the Railway and Canal Traffic Act, 1854, s. 2; by s. 3 of that statute a special remedy was created against anything done in contravention of the Act; and by s. 6 it was enacted that no "proceeding" shall be taken for anything done in violation of the statute, except such as was thereby provided. The machinery for enforcing the provisions of the Railway and Canal Traffic Act, 1854, has been varied by the Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48), s. 6; but the prohibition remains unaltered against using any remedy except such as is specially provided by the legislature.

R. E. Webster, Q.C., and *John Forbes, Q.C.* (*Lofthouse* with them), for the defendants. The plaintiffs' counsel have relied upon the

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(1) 1 C. B. (N.S.) 410.

(2) 5 C. B. (N.S.) 366.

(3) 1 C. B. (N.S.) 454.

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case of *In re Nicholson and Great Western Company* (1); but that decision is explained by Willes, J., in *Garton* v. *Bristol and Exeter Railway Company* (2). The judgment of that learned judge is directly in point, and shews that a difference in the charges of a railway company to its several customers can be supported only when it fairly represents a difference in the circumstances attending the carriage of the goods: and in the present case the arbitrator has found that the saving to the plaintiffs does not adequately represent the allowance on coal carried to Grimsby of 6*d.* or 2*d.* to Bannister, or of 4*d.* to Josse & Co., or the rebate of 2 per cent. allowed to both Bannister and Josse & Co. These allowances and this rebate, therefore, are clearly unlawful. The intention of the legislature was that all the customers of a railway company should be placed on the terms of strict equality: *Great Western Railway Company* v. *Sutton* (3); and the plaintiffs could not lawfully make to Bannister the allowance of 8*d.* in respect of coal shipped by the Hamburg-American steamers, or the allowance of 6*d.* in respect of coal shipped to ports south of Harwich: *London and North Western Railway Company* v. *Evershed* (4). A clear breach of the Railways Clauses Consolidation Act, 1845, s. 90, is committed by "the group rates:" the last clause of that section which forbids any reduction or advance in the tolls is a substantive enactment, and is not a mere explanation of the preceding portion of the proviso. The existence of an intention of a railway company to prejudice a customer has always been held to be immaterial; the question is whether the acts of the company do prejudice him. According to the argument for the plaintiffs, only overcharges can be recovered back by the defendants, and no action will lie upon s. 90 for damages; but this argument is unsound. The customer may have to pay the overcharges of the railway company, and by reason of those overcharges he also may receive a lower price from the merchant to whom he sells. Some kinds of damages may be recovered, although others are too remote. If the company refuse to carry goods tendered to them except at an illegal rate, they are liable to an action. A railway company are bound to carry for all persons, and s. 90 prescribes that they shall do so upon equal terms. The loss of customers through the illegal charges and conduct of a railway company is not too remote as a ground of damages: *Lancashire and Yorkshire Railway Company* v. *Gidlow.* (1)

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(1) 5 C. B. (N.S.) 366.

(2) 6 C. B. (N.S.) 639, at p. 655.

(3) Law Rep. 4 H. L. 226.

(4) 2 Q. B. D. 254; 3 Q. B. D. 135; 3 App. Cas. 1029.

The judges of the Queen's Bench Division were of opinion that no action will lie for a breach of the provisions of the Railway and Canal Traffic Act, 1854, owing to the terms of s. 6 thereof. But the object of that section may have been simply to forbid an information at the suit of the Attorney-General or the granting of an injunction by the Court of Chancery (2): it was not intended to forbid the bringing of an action for money had and received. The Railway and Canal Traffic Act, 1854, is not a statute within the operation of the rule that when a new right is created and a specific remedy is pointed out, that remedy must be followed and none other can be allowed. The argument for the plaintiffs is that no damages can be recovered, and that the only remedy is by the machinery of the Act; if this be correct, a trade or business may be ruined without compensation to the owner.

C. A. Russell, in reply. The true explanation of the proviso at the end of s. 90 of the Lands Clauses Consolidation Act, 1845, may possibly be that the first part of it prescribes an equality of charges for passengers and goods conveyed by the railway company along the line, whilst the second part applies to those instances where the line is used by persons other than the railway company; for in 1845 this was supposed to be possible.

As to the construction of the Railway and Canal Traffic Act, 1854, an action is a "proceeding," and where a special remedy is prescribed for breach of the provisions of a statute, it is to be inferred that the legislature intended that remedy to be followed in exclusion of all others, and no action will lie at the suit of any person damnified by disobedience to the statute: *Atkinson* v. *Newcastle Waterworks Co.* (3) An authority directly in favour of the plaintiffs is to be found in *Murray* v. *Glasgow and South Western Ry. Co.* (1), recently decided by the Court of Session in Scotland; that case clearly shews that the Railways Clauses Consolidation Act, 1845, has no application to "the group rates," and also that no action will lie for a breach of the provisions of the Railway and Canal Traffic Act, 1854.

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(1) Law Rep. 7 H. L. 517, at pp. 524, 525.

(2) See, however, per Kindersley, V.C., in *Attorney General* v. *Great Northern Ry. Co.,* 1 Dr. & Sm. 154, at p. 162; 29 L. J. (Ch.) 794, at p. 801.

(3) 2 Ex. D. 441.

Cur. adv. vult.

Dec. 1. The judgment of the Court (Brett, M.R., Cotton and Lindley, L.JJ.) was now delivered by

LINDLEY, L.J. This special case raises, in substance, five questions. The first relates to alleged overcharges arising from 8*d.* per ton deducted and allowed to a person named Bannister on coal conveyed by the plaintiffs for him from the South Yorkshire coalfield to Grimsby, and shipped by him on board Hamburg-American steamers. The second question relates to deductions of 6*d.*, 4*d.*, and 2*d.* a ton allowed to Bannister and certain merchants named Josse & Co. on coal taken by the plaintiffs to the yards of Bannister and Josse & Co. to the relief of the railway company's own rails, stations, and sidings. A third question relates to what may be shortly described as an allowance of 2 per cent. made to Bannister and Josse & Co. on returned empties in consideration of certain facilities in the delivery of those empties provided by these merchants. The fourth question relates to 6*d.* per ton allowed by the railway company to Bannister for coal brought by the railway company for him to Grimsby, and shipped by him to ports south of Harwich. The fifth question, and perhaps the most important one, relates to what is called the "group," and arises in this manner: the railway company charge one rate for the carriage of coal from various collieries in the South Yorkshire coalfield to certain towns although the distances between those collieries and the towns are not the same, some of the collieries being nearer to, and some farther from, the towns. The defendants, the proprietors of the Denaby Main Colliery, seek by their set-off and counter-claim to recover, either in the shape of overcharges or damages, sums of money in respect of the breaches and violation by the railway company of the provisions of the

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(1) 11 Court Sess. Cas., 4th Series p. 205.

90th section of the Railways Clauses Consolidation Act, 1845, and the 2nd section of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31).

With respect to s. 90 of the Act of 1845 we are of opinion that the word "using" at the end of the section signifies using in any sense, and is not confined to using by sending engines and other carriages along the line. The section applies to all tolls without distinction; and unless "using" includes using by sending goods, a distinction (not warranted by the Act) will be drawn between tolls for passengers and for engines and carriages on the one hand and tolls for goods sent in the ordinary way on the other. The former kinds of tolls will be held to be within the last part of the section, and the latter kind not. This is opposed to the purpose and object of the enactment. The Queen's Bench Division in *Evershed's Case* (1) came to the same conclusion as we do as to the meaning to be put upon the word in question (2); and we have not been able to find any case in which any other construction has been put upon it.

Confining ourselves to goods sent by a railway, we therefore construe s. 90 thus: (1.) It empowers the company to vary its tolls within the limits set by its special Act; (2.) The tolls, for the same classes of goods passing only over the same portion of the line, and under the like circumstances, must in all cases be equal; and (3.) There must be no reduction or advance in favour of or against any particular person.

It becomes, however, necessary to consider the meaning of the following expressions, namely, (*a*), "Passing only over the same portion of the line"; (*b*) "Under the like circumstances;" (*c*) "In favour of or against any particular person."

(*a*) The expression, "passing only over the same portion of the line," appears to us to mean, passing between the same points of departure and arrival, and passing over no other part of the line. This interpretation is the natural interpretation of the words; it was adopted by Lord Chancellor Cranworth in *Finnie* v. *Glasgow Ry. Co.* (3) and by the Court of Session in the recent case of *Murray* v. *Glasgow and South Western Ry. Co.* (4), and there is no decision in which any other interpretation has been put on the expression. If this be correct, it follows that the first part of the proviso in s. 90 has no application to what are referred to in the special case as the "grouped lines." The goods carried over them are not carried only over the same part of the line. They are carried over the same part, but also over other parts, and are not therefore within that proviso. This disposes of the 5th question, and to a great extent of the first and fourth questions also.

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(1) 2 Q. B. D. 254; 3 Q. B. D. 135; 3 App. Cas. 1029.

(2) See 2 Q. B. D. 267.

(3) 2 Macq. 183.

(4) 11 Court Sess. Cas. 4th Series, p. 205.

(*b*) The expression, "under the like circumstances," has been the subject of decision, and must now be taken to mean under like circumstances as regards the services performed by the railway company in receiving, carrying, and delivering the goods: see *Great Western Ry. Co.* v. *Sutton* (1) and *London and North Western Ry. Co.* v. *Evershed.* (2) In the present case the railway company have infringed this provision of s. 90, as regards some of the coal referred to in the first and fourth questions, *i.e.*, the coal carried from the defendants' colliery to Grimsby and shipped on the American steamers, and also as regards the coal carried from the same colliery to Grimsby and shipped to ports south of Harwich. The consequences of this infringement will be considered presently.

(*c*) The expression, "in favour of or against any particular person," at the end of s. 90 remains to be considered. These words occur in a sentence, which follows the early part of the proviso, and which is part of that proviso. The prohibition at the end of s. 90 appears to us to do little more than throw light on what is meant by "same circumstances," and emphasise the earlier portion of the proviso. Both portions of it are confined to cases in which goods of a similar description are carried only between the same termini and under the same circumstances. We do not think that the prohibition extends to other goods not so carried. The prohibition is not an independent enactment applicable to goods not already provided for. If it were, the whole section would prescribe equality of rate of toll in all cases; for tolls, which can neither be reduced nor advanced in favour of or against any one, must be at the same rate to all persons. But this equality of rate is expressly required for goods of the same sort carried only over the same portion of the line and under the same circumstances, and being expressly required for such goods, similar equality can hardly have been intended for all goods. We come, therefore, to the conclusion, that the equality clause and prohibition against favouritism contained in s. 90 are both confined to the cases specified in the proviso, and that the prohibition against favouritism at the end of the section is not more extensive in its operation than the equality clause which immediately precedes it. This appears to be the view taken by Lord Blackburn in *Sutton's Case* (1), although it was not necessary to decide the point in that case. This view of s. 90, no doubt, very seriously limits its operation. But its failure to accomplish its supposed object is notorious, and that very circumstance led to the passing of the much more sweeping enactment contained in the Railway and Canal Traffic Act, 1854.

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(1) Law Rep. 4 H. L. 226.

(2) 3 App. Cas. 1029.

The circumstances, under which the railway company in this case charged Bannister and Josse & Co. less than other people in respect of coal for land sale and for returning their empty trucks, are set out in the case, and such circumstances are different from those under which the company charged other people more. We are, therefore, of opinion that the company have not contravened the provisions of s. 90 in these cases, and that they must be dealt with under the Railway and Canal Traffic Act of 1854.

This Act is very differently worded from s. 90 of the Railways Clauses Consolidation Act, 1845. The railway company may have infringed the provisions of s. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31); but even if they have, no action lies for such infringement. Sect. 3 prescribes the remedy for infringements of the Act, and s. 6 says that no other proceedings than those mentioned in the Act shall be taken against companies which violate it. The word "proceeding" in s. 6 must include "action." There might possibly be some doubt about this, if the section did not go on to preserve all rights and remedies against companies under the existing law, but the addition of these words removes all doubt on the subject. It is certainly true that in *Evershed's Case* (2) Lord Bramwell expressed an opinion that an

(1) See Law Rep. 4 H. L. 238, 243.

(2) 2 Q. B. D. 254; 3 Q. B. D. 135; 3 App. Cas. 1029.

action would lie for a violation of s. 2 of the Act in question (1); but his attention was not drawn to s. 6; and in *Evershed's Case* (2) there was a violation of s. 90 of the Railways Clauses Consolidation Act, 1845, for which the action lay; so that it was immaterial to consider whether the action could have been maintained for a breach of s. 2 of the Railway and Canal Traffic Act, 1854, alone. This point has recently been considered and decided in Scotland, and an action was held not to lie: see *Murray* v. *Glasgow and South Western Ry. Co.* (3), and this view of s. 6 was also that of the Divisional Court in this case, and is in our opinion correct. It is hardly necessary to add that if the defendants cannot maintain an action for a violation of the Act in question, they cannot maintain any set-off or counter-claim based on such a violation. This disposes of the second and third questions.

It remains only to consider what damages, if any, the defendants have sustained by reason of the company's reduction of their tolls for the coal carried from the defendants' colliery for Bannister and shipped at Grimsby for the American steamers and for ports south of Harwich. The defendants in fact sent no coals to Grimsby for such shipment, nor did they ever request the railway company to carry coals for such shipment. If they had, there is no reason to suppose that they would have been charged more than Bannister. The complaint of the defendants is that the railway company prevented them from competing in trade with Bannister; but this is not made out. The railway company in no way prevented the defendants from obtaining orders from the Hamburg and American Shipping Company for South Yorkshire coal. Nor did the railway company prevent the defendants from shipping coals to ports south of Harwich on the same terms as regards tolls as Bannister. The fact, however, remains that at various times the railway company did carry coals to Grimsby for the defendants and Bannister under the like circumstances, as regards trouble and cost to the company, and as regards coal got from the defendants' collieries over the same portion of the line; and the company did charge Bannister for

(1) See 3 Q. B. D. 144.

(2) 2 Q. B. D. 254; 3 Q. B. D. 135; 3 App. Cas. 1029.

(3) 11 Court Sess. Cas. 4th Series, p. 205.

the coals so carried for him less than they charged the defendants; and if the defendants had shewn that they had thereby sustained pecuniary loss, they would have been entitled to recover damages in respect thereof. The Divisional Court has held the defendants entitled to recover overcharges made to the defendants on the principle laid down in *Evershed's Case* (1), i.e., the charges made to them in excess of the charges made to Bannister for similar services. But the Court does not say on what quantity of coal, or on how much of the defendants' coal carried to Grimsby this excess is to be calculated, and we are unable to see how the quantity is to be fixed. This difficulty did not arise in *Evershed's Case* (1); and the principle of that case seems to us inapplicable to the assessment of damages in this case. It cannot be right to calculate the amount of overcharge on all the coal sent by the defendants to Grimsby without reference to the quantity on which, or the times during which, a less rate was charged to Bannister, and, as already stated, we do not see on what principle to fix the amount of alleged overcharge. Under the peculiar circumstances of this case the defendants have not shewn any grounds which will justify the Court in holding the railway company liable to them for any overcharges or damages. There is, therefore, nothing to be ascertained by the arbitrator on this head.

The result, therefore, is that all five questions must be answered adversely to the defendants, and that on the facts stated in the special case the plaintiffs are entitled to judgment on the set-off and counter-claim pleaded by the defendants. The costs of the action and reference will be disposed of by the arbitrator, but the railway company is entitled to the costs of the appeal.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Cunliffe, Beaumont, & Davenport, for R. Lingard Monk, Manchester.*

Solicitors for defendants: *Indermaur & Co., for F. W. Fisher, Doncaster.*

J. E. H.

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(1) 2 Q. B. D. 254; 3 Q. B. D. 135; 3 App. Cas. 1029.

1884
March 14.

HODKINSON *v.* THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

Carrier—Railway Company—Passenger's Luggage—Delivery to Passenger—Termination of Company's Risk.

The plaintiff arrived at a station on the defendants' railway with her luggage contained in two boxes which were taken from the luggage-van by a porter in the employ of the company. The porter asked the plaintiff if he should engage a cab for her. In reply she said she would walk to her destination, and would leave her luggage at the station for a short time, and send for it. The porter said: "All right; I'll put them on one side and take care of them;" whereupon the plaintiff quitted the station leaving her boxes in the custody of the porter. One of them was lost:—

Held, that the transaction amounted to a delivery of the luggage by the company to the plaintiff, and a re-delivery of it by her to the porter as her agent to take care of, and that consequently the company were not responsible for the loss.

Patscheider v. *Great Western Ry. Co.* (3 Ex. D. 153) distinguished.

THIS was an action brought in the Ashton-under-Lyne County Court, to recover from the defendants 32*l.* 13*s.* 3*d.*, the value of a box and its contents alleged by the plaintiff to have been left in charge of their servant at Park Parade Station, Ashton-under-Lyne, on the 17th of April, 1883, and 5*l.* special damages alleged to have been sustained by the detention of the box and its contents. The facts were as follows:—

1. On the 17th of April, 1883, the plaintiff, who is a governess living at Ashton-under-Lyne, having previously taken from the left luggage office at Preston Station, where she had deposited it, the box which is the subject of this action and another box, took a ticket at the defendants' booking-office from Preston to Stockport, and left for Stockport in the defendants' train.

2. At Stockport the plaintiff re-booked to Ashton-under-Lyne, the ticket being issued by the defendants; and her two boxes were delivered into the custody of the defendants. The line between Stockport and Guide Bridge belongs to the defendants, and that between Guide Bridge and Ashton-under-Lyne to the Manchester, Sheffield, and Lincolnshire Railway Company, who are also the owners of the station at Ashton and the masters of the porters and other servants at such station; but the porters

and other servants attend to the arrival passengers and to their luggage also on behalf of the defendants. The defendants exercise running powers between Guide Bridge and Ashton-under-Lyne.

3. The plaintiff arrived at Ashton Station at 4.25 p.m., her two boxes being in the luggage-van, from which they were taken by the guard of the train and two station porters.

4. The plaintiff expected to be met at the station, and asked if there was any one there to meet her; to which one of the porters replied that there was no one, and asked if he should engage a cab. The plaintiff said she would walk, and would leave her boxes at the station for a short time, and then send for them. The porter replied, "All right. I'll put them on one side and take care of them;" whereupon the plaintiff quitted the station, leaving her boxes in the custody of the porter.

5. At about 6 p.m. the same evening the plaintiff claimed her boxes, when the porter stated that he had delivered one of them (the missing one) to a woman who he thought was the owner, and that she had taken it away. This woman was not known to the plaintiff, nor had she any authority to obtain the box.

6. On the above facts, the judge found that from the time the boxes were delivered to the defendants at Stockport till the missing box was given up by the porter in the manner above mentioned, the plaintiff had never resumed possession of the missing box by herself or by any one on her behalf, and that the box was during all that time in the custody of the defendants or their agents.

7. There is an office for left luggage at the station at Ashton; but there was no notice thereof in any part of the station; nor was the plaintiff informed of the fact that such an office existed.

8. The judge found as a fact that the box was lost to the plaintiff by the porter's parting with it in the manner above stated by him; and that there was no contributory negligence on the part of the plaintiff.

It was submitted for the defendants that they were entitled to judgment, on the following grounds,—first, that the taking the plaintiff's boxes out of the van and placing them on the platform at Ashton in the manner described was a delivery of the boxes to the plaintiff,—secondly, that, if the porter was the servant of the defendants, he had no authority to bind them as to the matters in dispute, as the plaintiff should have left her boxes in the left-luggage office,—thirdly, that the sum claimed for special damage could not be recovered.

Judgment was given for the plaintiff for the whole sum claimed.

The question for the Court was whether the plaintiff was entitled to recover the whole or any part of the amount.

Page, for the defendants. But for the statement in par. 6, that, from the time the boxes were delivered to the defendants at Stockport till the missing box was given up by the porter to the stranger, the plaintiff had never resumed possession of the missing box by herself or by any one on her behalf, the case would have been free from doubt. But that statement is not warranted by the facts. On the arrival of the train at Ashton the two boxes were delivered to her by the porter, who offered to place them on a cab; but she declined to take a cab, and elected to make the porter (who in this was not acting as the servant of the company) her agent for the purpose of taking care of the luggage until she chose to send for it.

Barnes, for the plaintiff. There was no delivery of the box to the plaintiff; and until that should take place the duty of the company was not ended: Redfield on Carriers, p. 61; *Patscheider* v. *Great Western Ry. Co.* (1) Unless that which passed between the plaintiff and the porter amounts in point of law to a delivery of the box to the plaintiff in discharge of the obligation of the company and a re-delivery by her to the porter as her agent, the plaintiff is entitled to judgment.

LORD COLERIDGE, C.J. I am of opinion that that which passed when the plaintiff's luggage was taken from the luggage-van and placed at her disposal put an end to the responsibility of the company. The plaintiff when she quitted the station left her luggage "in the custody of the porter," who had then ceased to be acting as the company's agent. The statement in par. 6 of

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(1) 3 Ex. D. 153.

1884

HODKINSON v. LONDON AND NORTH WESTERN RAILWAY CO.

the case is not the legal conclusion from the facts proved. *Patscheider* v. *Great Western Ry. Co.* (1) is clearly distinguishable; there, the plaintiff had no opportunity of taking possession of her box. Possibly the porter may be responsible for the loss; but the company clearly are not.

CAVE, J., concurred.

Judgment for the defendants.

Solicitors for plaintiff: *Booth & Andrew, Ashton-under-Lyne.*
Solicitor for defendants: *C. H. Mason, Euston Station.*

J. S.

[IN THE COURT OF APPEAL.]

Dec. 3.

WEBSTER *v.* MYER.

Practice—Proceeding—No Proceeding for a Year—Notice—Rules of Supreme Court, 1883, *Order XIII., r.* 3; *Order LXIV., r.* 13.

Where on default of appearance by the defendant the plaintiff takes no step in the cause for a year, Order LXIV., r. 13, applies, and notice is necessary before judgment can be signed.

APPEAL from an order of a judge at chambers, confirming the order of a master, who refused leave to the plaintiff to sign judgment without giving a month's notice to the defendant under Order LXIV., r. 13, by which, "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed."

The action was brought in September, 1881, to recover the amount of a solicitor's bill. The writ was served in December, 1881, but the defendant did not appear, and no step was taken by the plaintiff until September, 1884, when the affidavit of service was sworn, and in the month of November following application was made to the proper officer of the Court to enter judgment for default of appearance. This was refused on the ground that no proceeding had been taken in the action for more than a year after service of the writ. The plaintiff then

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(1) 3 Ex. D. 153.

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WEBSTER v. MYER.

applied to a master for leave to sign judgment for default of appearance, but this was refused for want of notice to the defendant. The judge at chambers confirmed the refusal of the master, and the plaintiff appealed to the Court.

Nov. 24. *Poulter*, in support of the application. By making default in appearing the defendant admits he has no defence, and it cannot be necessary to give him notice of a step which follows as a matter of course from his admission. Formerly a plaintiff might enter up judgment on a cognovit given before appearance, and upon which no step had been taken for more than a year without first giving a term's notice or obtaining leave of the Court or a judge: *Thompson* v. *Langridge* (1); and the rule as to a term's notice did not apply to a proceeding after verdict: *May* v. *Wooding* (2); *Newton* v. *Boodle.* (3) *Staffordshire Joint Stock Bank* v. *Weaver* (4) is against the present application, but it is inconsistent with the decisions above quoted.

PER CURIAM (Mathew and Smith, JJ.). The order appealed against is right. The plaintiff desires now to proceed in the action by signing judgment. There has been no proceeding in the action for a year from the last proceeding had, and Order LXIV., r. 13, applies in terms to this case.

Rule refused.

A. M.

The plaintiff appealed to the Court of Appeal.

Dec. 3. *Poulter* moved ex parte for the plaintiff. When the present application was made at chambers, Field, J., adhered to his decision in *Staffordshire Joint Stock Bank* v. *Weaver* (4), but that case and the decision of the Queen's Bench Division now appealed from are clearly inconsistent with *May* v. *Wooding* (2) and *Newton* v. *Boodle* (3) and the authorities collected in Archbold's Practice, vol. i., 13th ed., p. 180. The omission to appear and defend the action is at least as much a confession of it as a cognovit; and under the old practice a term's notice of the intention to proceed was unnecessary when the defendant had given a cognovit: *Thompson* v. *Langridge.* (1) As the defendant has not appeared, he can take no proceeding in the action, there is no controversy between the parties. If the judgment is improperly obtained, the defendant notwithstanding his default in appearing can apply to set it aside.

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(1) 1 Ex. 351.

(2) 3 M. & S. 500.

(3) 3 C. B. 795.

(4) W. N. 1884, p. 78.

BRETT, M.R. The question before us is, whether the entry of judgment for default of appearance is a "proceeding" within the meaning of Rules of the Supreme Court, 1883, Order LXIV., r. 13. Upon default of appearance to a writ of summons indorsed for a liquidated demand, the plaintiff may, under Order XIII., r. 3, enter final judgment; but he must shew to the satisfaction of the Court, acting through its officer, that the writ of summons has been duly served upon the defendant; and by rule 2 of the last-named Order the plaintiff is directed to file an affidavit of service. The service of the writ of summons is a step and a proceeding in order to obtain judgment and execution. Now Order LXIV., r. 13, provides that where no proceeding has been taken for a year, the party who desires to proceed shall give a month's notice of his intention to proceed. I think that from its very nature the entry of judgment is clearly a "proceeding" in an action; and if it be so, it is impossible to suppose any step which comes more completely within the operation of the rule. It has been urged that the authorities shew that notice of the intention to proceed is unnecessary. I will mention two of them. In the first of these cases, *May* v. *Wooding* (2), a verdict had been obtained more than three years before judgment was signed, and a term's notice was not given; but it was held by the Court of King's Bench that the judgment was duly signed. The other case, *Newton* v. *Boodle* (3), appears to have been decided upon the authority of *May* v. *Wooding.* (2) These were cases of proceeding after verdict, and it is not necessary to consider whether we could agree with these decisions; if the present were a case as to a proceeding after verdict, it would perhaps be difficult for us to express dissent from those cases; but it is to be observed that they were decided upon different Rules of Court, and it may be

(1) 1 Ex. 351.

(2) 3 M. & S. 500.

(3) 3 C. B. 795.

that they are not binding as to the construction of Order LXIV., r. 13; at all events they apply only where there has been a verdict. In the present case a month's notice of the intention to proceed ought to have been given.

LINDLEY, L.J. I am of the same opinion. The present application is really an attempt to repeal Order LXIV., r. 13. The fact of more than a year having elapsed since the last proceeding, seems to shew that the plaintiff had intended to abandon the prosecution of the action, and it might be very unjust to allow him to sign judgment without giving the defendant an opportunity of establishing to the satisfaction of the Court that the plaintiff is not entitled to proceed further.

Appeal dismissed.

Solicitor: *William S. Webster*, Plaintiff in person.

J. E. H.

Jan. 15.

SAUNDERS *v.* PAWLEY.

Practice—Notice of Trial, Right of Defendant to give—Abridgment of Time—Order XXXVI., r. 12; *Order LXIV., r.* 7.

Order XXXVI., r. 12, provides that, if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the Court or a judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the Court or judge to dismiss the action for want of prosecution.

Order LXIV., r. 7, provides that the Court or a judge shall have power to enlarge or abridge the time appointed by the rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require:—

Held, that the period of six weeks mentioned in Order XXXVI., r. 12, is not a time appointed for doing any act or taking any proceeding within Order LXIV., r. 7, and consequently that the Court could not make an order giving the defendant leave to give notice of trial, if the plaintiff did not give such notice within a shorter period than six weeks from the close of the pleadings.

APPEAL from the refusal by a judge at chambers of an application by the defendant for an order that, if the plaintiff did not give notice of trial for the next ensuing Surrey assizes, then the defendant should be at liberty to give short notice of trial for such assizes.

The facts were, so far as material, as follows:—The action was for a false representation that the drains of a house were in good condition whereby the plaintiff was induced to become the occupier of the house. The writ was issued on the 8th of July, and served on the 25th of July, 1884. The defendant appeared on the 1st of August. On the 14th of December, the pleadings were closed and the parties were at issue. The plaintiff had not given notice of trial. The venue was Surrey, and the Surrey assizes were fixed to take place on the 20th of January, 1885: consequently the period of six weeks required to elapse by Order XXXVI., r. 12, before the defendant can give notice of trial had not elapsed, and would not elapse till too late for trial at the next Surrey assizes. Application was made by the defendant to a master at chambers in similar terms to those above mentioned, upon affidavits setting forth that great hardship and injury would be occasioned to the defendant by the postponement of the trial till the summer assizes, the defendant being prevented pending the trial from re-occupying or dealing with the premises, the state of which was the subject-matter in dispute, and that the plaintiff could, and ought, under the circumstances, to go to trial at the next assizes. The master refused the application, and on appeal the judge at chambers affirmed the master's decision.

E. Clarke, Q.C., and *Morton Smith*, for the defendant, moved on appeal from the judge's decision in the terms above mentioned.

The Court has power, under Order LXIV., r. 7, to abridge the period of six weeks mentioned in Order XXXVI., r. 12, and enable the defendant to give notice of trial if the plaintiff do not give notice within a shorter period than six weeks, where the justice of the case requires it.

McCall, for the plaintiff, shewed cause. The Court has no power to make the order asked for. The plaintiff is not in default. No fixed time is appointed by the rules for giving notice of trial, and the plaintiff may give such notice when he pleases, subject to the provisions of Order XXXVI., r. 12, which provides that, if he does not give notice of trial within six weeks, or such extended time as may be ordered, the defendant may give such notice or apply to dismiss the action for want of prosecution. It is contended that the defendant's right to give notice of trial is absolutely dependent upon the condition expressed in the rule, viz., that the six weeks shall have elapsed. The terms of the rule shew that that period may be enlarged, but that it cannot be abridged, for it says "within six weeks after the close of the pleadings or within such extended time as the Court or a judge may allow." Order LXIV., r. 7, does not apply to the period of six weeks mentioned in Order XXXVI., r. 12, for it is not a "time appointed for doing any act or taking any proceeding" within the meaning of that rule. That rule refers to cases where fixed times are appointed within which proceedings must be taken; there is no fixed time appointed within which notice of trial must be given. There is no provision in the rules under which the Court can dispense with or alter the condition expressed in Order XXXVI., r. 12, or allow the defendant to give notice of trial, although the condition, upon which his right to do so arises according to that Order, is not fulfilled. Provision is expressly made by Order LXIV., r. 9, for abridging the time for giving notice of trial in Admiralty cases, the inference from which is that rule 7 of that Order does not apply, and that specific provision for that purpose would have been made if it had been thought necessary in the case of other actions. Secondly, if the Court had the power to abridge the plaintiff's time for giving notice of trial, no sufficient ground has been shewn for doing so in the present case. The plaintiff not being in default, it is not a sufficient reason that it would be much more convenient for the defendant that the notice of trial should be given before the lapse of six weeks. [He cited *Eaton* v. *Storer* (1); *Pilcher* v. *Hinds* (2); *Curtis* v. *Sheffield* (3); Rules of the Supreme Court, Oct. 1884, Order XXXVI., r. 22 (*b*).]

E. Clarke, Q.C., in reply. Order LXIV., r. 7, applies. The period of six weeks mentioned by Order XXXVI., r. 12, is a "time appointed for the taking of a proceeding." The defendant cannot give notice of trial till after the lapse of six weeks, but upon the lapse of such period without the plaintiff's giving notice of trial,

(1) 22 Ch. D. 91.
(2) 11 Ch. D. 905, 907.
(3) 21 Ch. D. 5.

the defendant's right to give notice of trial arises. It is therefore a time appointed for the taking of a proceeding by the defendant.

[LOPES, J. The defendant is not really seeking to abridge a period within which one of the parties is bound to take a proceeding, but to dispense with the condition upon which the defendant's right to give notice of trial depends by accelerating the period at which, according to the rule, it would arise.]

GROVE, J. I entertained a strong opinion in favour of the defendant at one time during the argument, and up to a certain point that opinion has not been shaken. I do not think the cases cited for the plaintiff touch the questions in the present case, viz. whether the power given by Order LXIV., r. 7, applies, and whether it ought under the circumstances to be exercised. It does not appear to me that anything was said in those cases which shews that the times appointed by the rules may not be abridged or enlarged as the case may be, when the necessity of the case requires it, in order that justice may be done, and where irremediable harm or injustice would be done to a party without any fault of his own unless the time were so enlarged or abridged. If we had the power to grant this application, I think that the defendant has made out a very strong case for our interference, and that very serious injury and hardship will be caused to him by the plaintiff's delay in giving notice of trial. The plaintiff is not in default in the sense that he has failed to take any step within any period limited for taking such step, but I cannot help thinking that he might, if he had wished, have got ready for trial, and that he has not behaved altogether well in the matter. But although, on the merits, I am entirely in the defendant's favour, I feel reluctantly compelled to yield to one of the arguments used by the plaintiff's counsel. The argument is that, though in one sense the period of six weeks mentioned in Order XXXVI., r. 12, is an appointed time, it is not a "time appointed for doing an act" in the sense which would make Order LXIV., r. 7, applicable.

By Order XXXVI., r. 12, the defendant is given an exceptional power which, so far as I can see, depends entirely on that rule and must be limited by its terms. Primâ facie it lies with the plaintiff to give notice of trial, and, subject to this rule, he may give it at such time as he may choose. What we are asked to do is to allow the defendant to exercise the power given by the rule, although the condition, upon fulfilment of which such power is by the terms of the rule to arise, has not been fulfilled. The rule does not say that the plaintiff shall give notice of trial within six weeks, but that if he does not give notice within six weeks, or within such extended time as the Court or a judge may allow, then the defendant may give notice or apply to dismiss the action for want of prosecution. The question is whether on the true construction of the rules the sole power of giving notice of trial given to the defendant is dependent upon the condition that six weeks shall have elapsed without the plaintiff's doing so, or whether we can by abridging that time give another and a different right of giving notice of trial to the defendant. I come, though as I have said with reluctance so far as this case is concerned, to the conclusion that Order LXIV., r. 7, does not give us the power contended for, and that it would be unduly straining the words of that rule to apply it to a particular exceptional power given expressly upon the fulfilment of a certain condition. It appears to me that we cannot alter the condition expressly stated in Order XXXVI., r. 12, by the application of Order LXIV., r. 7. I cannot say I arrive at that conclusion without considerable doubt, but at any rate I certainly cannot see my way to the opposite conclusion with sufficient clearness to overrule the decision of the judge at chambers.

LOPES, J. I also am sorry that I cannot decide in favour of the defendant, because I am clearly of opinion that the merits are on his side. We are asked to apply the provisions of Order XXXVI., r. 12, although the period of six weeks mentioned by that Order has not expired. It is to be observed with regard to the Order that no time is therein specified within which the plaintiff is bound to give notice of trial; it is left entirely to his option to give it when he thinks fit, subject, however, to this, viz., that on his not giving it within six weeks, or such extended time as the Court or a judge may allow, the defendant may give notice of trial or apply to dismiss the action. The period of six weeks so mentioned not having expired, reliance is placed on Order LXIV., r. 7, as enabling us to abridge that time. I do not think that this case is within that rule. With regard to certain matters provided for by the rules, certain times are specified within which they must be done; for example, times are specified within which an appearance must be entered, a statement of claim or defence must be delivered, and interrogatories must be answered. I think the rule was intended to apply to cases of that kind, and that in such cases there is a time appointed within its meaning. I do not think that it was intended to apply to cases within Order XXXVI., r. 12, or to enable us to accelerate a remedy or an indulgence given to the defendant upon a certain express condition, viz., default made by the plaintiff for a certain period of time. For these reasons I think the application must be refused.

Application refused.

Solicitor for plaintiff: *G. R. Dodd.*
Solicitor for defendant: *P. K. Langdale.*

E. L.

[IN THE COURT OF APPEAL.]

1884
Nov. 15.

LAST (SURVEYOR OF TAXES), APPELLANT; THE LONDON ASSURANCE CORPORATION, RESPONDENTS.

Income Tax—Insurance Company—"Annual Profits or Gains"—Sums paid as Bonuses to participating Policy-holders.

A life insurance company issued "participating policies," according to the terms of which any surplus which existed at the end of each quinquennial period in the hands of the company, after payment of policies falling due during such period and provision for outstanding liabilities, was dealt with as follows: two thirds of the surplus went to the policy-holders, who received payment thereof either by way of bonus or abatement of premium; the remaining third of the surplus went to the company, who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division among the shareholders:—

Held, by Brett, M.R., and Cotton, L.J. (Lindley, L.J., dissenting) that the sums payable to the participating policy-holders as above mentioned did not constitute "profits or gains" of the company assessable to income tax.

APPEAL by the surveyor of taxes from the decision of the Queen's Bench Division (1), on a case stated by the Income Tax

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(1) 12 Q. B. D. 389.

Commissioners for the city of London. The facts are set out in the report of the proceedings before the Queen's Bench Division, but it is sufficient to refer only to those which appear in the above head-note, as on the argument on the appeal counsel for the appellant confined the appeal to the question whether the two thirds of the surplus which went to the policy-holders by way of bonus or abatement of premium were assessable to the income tax, upon which question the Divisional Court was divided in opinion.

Sir H. James, A.G., and *A. V. Dicey* (*Sir Farrer Herschell, S.G.*, with them), for the appellant. The bonuses paid to the policy-holders are paid out of the profits made by the company, and are therefore taxable under the Income Tax Acts. *Mersey Docks* v. *Lucas* (1) shews that the destination of the fund cannot affect the question whether it is taxable or not. If the fund represents the profits it is immaterial for this purpose what the company may afterwards do with it, whether they apply it to a sinking fund or give it to their policy-holders. The bonuses are here a return to the policy-holders of a portion of the profits which the business has made. If profits have been made by the company the policy-holders get back in addition to what they have paid in the shape of premiums some portion of these profits. No appeal is made from the decision of the Court below on the other points which arose in this case.

Sir H. Giffard, Q.C. (*Charles, Q.C.*, and *A. P. Stone*, with him), for the respondents. The whole question depends upon the meaning of the word "profits." It is not denied that if these bonuses are profits the destination of them is immaterial, but the sums paid back to the policy-holders never formed any of the profits of the company, and the mistake of the appellant in this case arises from confounding the company with its customers; what is paid to the customers is paid under the contract by which they became customers and to induce them to become such, and though regulated by the amount of profits is no part of the profits, but is a sum which has to be paid before there are any profits divisible amongst the shareholders.

Sir Henry James, A.G., replied.

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(1) 8 App. Cas. 891.

Brett, M.R. It seems to me that by the Income Tax Acts people who carry on a trade or business are to pay income tax upon the profits of the business which is theirs. The profits, within the meaning of those Acts, are, I think, those things which ordinarily in a business sense are called profits of the person who is carrying on the business. They are the receipts which he receives from the business, less the expenses to which he is put in order to earn these receipts. The receipts are procured from the people who deal with him, properly called his customers. The expenditure is what he has to expend out of these receipts or otherwise, in order to obtain these receipts. The only person to be considered in the matter is the person who is carrying on the business, and he is the person who has to pay the income tax. In order to consider that matter with regard to him, therefore, you have to consider him as a person in antithesis to the persons called his customers. Now a business may be carried on by an individual, or by an ordinary partnership, or by a company which has shareholders. Where a business is carried on by a company which has shareholders the company carry on the business nominally, but the people who are really carrying it on and for whose benefit it is carried on are the shareholders. Therefore, in such a case, when you are considering the people carrying on the business as distinguished from the people who are dealing with them, the two opposite sets of people are the shareholders and the customers. Then in this case of a life assurance business the people who are carrying on the business are the company as representing the shareholders, and the people with whom they carry it on are the customers who take policies and who pay premiums thereon. The business is carried on, in fact, in this way:—the customers, when they take out the policies and as long as the policies remain, pay annual sums of money in respect of them, and those sums are the gross receipts of the company. Now what do the company, in fact, expend in order to get that business? There are the expenses of management and those ordinary things which are not now in question. But what else do they expend? Upon certain conditions they pay to the customers certain sums of money in each year. Can it be suggested by business men that the company, out of mere benevolence, pay money to their customers? Why should they? In business money is not paid out of affection, but for a business purpose, namely to induce people to become customers or to remain customers. There is no other business reason for it. If so, it is an expenditure which is made in fact in order to get the receipts from the company's customers. Now the profits on which the income tax is to be paid, in a trade or business, are the annual profits, and such profits are arrived at by making up the accounts, and seeing what has been received in the year and what has been paid, in order to get those receipts. The profits are the difference between the two. When the company have got the profits, they may deal with them in several ways. If they put them to the reserve fund they are still the company's. But how can that which is paid back to people with whom they are dealing be part of the business profits? That is a thing I cannot understand. The Attorney-General was obliged to argue that your customer is your partner, which is almost a contradiction in terms. It is difficult, no doubt, to distinguish between that which goes to the shareholders and that which goes to the customers. The distinction to my mind is this, that the shareholders are the people carrying on the business, and what goes to them is the very thing which has to pay income tax. But what goes to the customers is something which does not go to the shareholders, and which does not go to anybody who is carrying on the business, but to the people with whom the persons who are carrying on the business are dealing. That is the whole distinction as it seems to me. The whole thing comes after all not to be a question of law, for we are all agreed about the law, but to this: if this is a part of the profits of the business we are all agreed the company must pay income tax upon it, but if it is to be looked at as an expenditure which the company make in fact in order to enable them to earn their receipts, then we are all agreed that the income tax must only be paid upon what are the receipts after deducting it. It seems to me, that in business, and according to the ordinary modes of business, what a person keeps or deals with for his own benefit is that which is to be taxed, and what he pays to his customers in order to induce them to become, or to remain customers, is part of his expenditure, and cannot be brought into the subject-matter of taxation. I therefore think that the money which the company pay in fact in order to induce their customers to deal with them is an expenditure, and consequently my judgment goes with my Brother Day, and I think that the appeal must be dismissed.

COTTON, L.J. The question here is a short one but a nice one. It has been decided by the House of Lords in *Mersey Docks* v. *Lucas* (1), agreeing with this Court, that even if by statute profits are to be applied in a particular way which prevents the corporation receiving them from getting any benefit they are still assessable to the income tax, and the real question here is this: whether what is divided between the policy-holders is profits so as to be assessable under the Income Tax Acts, or whether it is a sum to be deducted before the profits are ascertained. Now the Master of the Rolls has stated, and I quite agree with him, what the profits in carrying on a business are. They must be the receipts after deducting all sums honestly paid for the purpose of producing those receipts. In my mind the difficulty arises very much from the ambiguous use of the word "profits." What are the profits in the participating policies, a proportion of which goes to the participating policy-holders? They are not the nett profits. As I understand the expense of management is not thrown on that sum, which is divided between the policy-holders, but is borne by the portion which goes to the shareholders. The contract with the policy-holders is this,—If, after paying certain expenses there remains a surplus sum, then such policy-holders are to have a certain portion of that. In my opinion that is not a distribution of profits when really ascertained, but of a sum which by contract with the policy-holders the body taxable, that is this company, agree to pay to those who will deal with them. Undoubtedly that must increase the number of customers who might be induced to take policies on the participating system, and, in my opinion, it is paid honestly for the purpose of securing a larger amount of return from the business than would otherwise come to the company. By the Act of 5 & 6 Vict. c. 35, s. 54, in the case of a company, an estimate has to be made on the amount of the annual profits and gains of such company before any dividend shall be made "to any other persons, corporations, or companies having any share, right, or title in or to such profits or gains." That might seem to be against the view I entertain, but the word "dividend" there clearly, in my opinion, means that which is to be divided between those who claim it, not by their contract with the company but by their position as shareholders. Undoubtedly their position as shareholders depends upon that which was their contract with the association when they joined it, but that is only regulating their position as shareholders. The profits or dividends which they get they get quâ shareholders, and in my opinion it would be impossible here to contend that because by contract these policy-holders are entitled not only on death to a certain fixed sum, but also to certain bonuses from time to time, that they receive those bonuses as shareholders or partners in the concern. They receive them by an independent contract which is made with them, not as shareholders, but as customers of the concern. In my opinion, therefore, this sum about which the only question is now raised ought not to be charged with income tax.

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(1) 8 App. Cas. 891.

LINDLEY, L.J. I am unable to take the same view. I cannot myself hold as a matter of fact that these bonuses are in any way mere expenses incurred in earning the receipts of the company. Of course I see that the larger the bonus held out to people who effect policies, the greater is the inducement to insure with the company. But these bonuses are not like the expenses of management or anything that must be necessarily incurred for the purpose of carrying on the business. I cannot see how the fund for division can be regarded as spent in earning itself. In my view the fund which is divided partly among the shareholders and partly among the policy-holders is the excess of the earnings over the expenses incurred in earning that excess. The sum that goes to the shareholders is one-third and two-thirds go to the policy-holders, and both so go by virtue of contracts with the company. It is true that one-third goes to the shareholders because they are shareholders, and two-thirds go to the policy-holders because they have contracted without being shareholders. But contract is at the bottom of the whole distribution. I cannot see any distinction between the two portions of the fund. Both are profits made by the company: it appears to me that the view taken by Smith, J., in the Court below is correct.

Appeal dismissed.

Solicitor for appellant: *Solicitor to the Inland Revenue.*
Solicitors for respondents: *Collyer-Bristow & Co.*

W. P.

[IN THE COURT OF APPEAL.]

Nov. 4.

THE ATTORNEY-GENERAL AT THE RELATION OF THE WHITECHAPEL BOARD OF WORKS *v.* HORNER.

Market—Market not limited by Metes and Bounds—Extension of Market—Streets subject to Market Rights—Street Acts of Parliament not affecting Market—Usage—Presumption of lost Grant.

By letters patent in 34 Charles II. the King granted to the predecessor in title of those under whom the defendant claimed as lessee the right to hold two markets—one on Thursday and the other on Saturday—in every week, "in or next to Spital Square." The market-place and four inner streets connected therewith were made by the grantee on the square piece of land which had formerly been Spital Square, and which land he had acquired when the charter was granted to him, but he never acquired the adjoining land which surrounded such square piece, and on which, subsequently to the charter, were made certain outer streets, into which the four inner streets ran. By letters patent in 4 James II., made void by 2 Wm. & M. sess. 1, c. 8, a third market was given, viz., on Monday in every week, and a market on Wednesday substituted for that on Thursday.

In proceedings taken at the instance of the local authority to restrain the defendant from licensing the sale of goods in either the outer or the inner streets adjoining the market, the local authority relied on certain Paving Acts of Geo. 3, which empowered such authority to remove the obstruction caused by selling articles in those specific streets, and the defendant proved a usage from the time of living memory to sell vegetables and fruit in any of those streets, and to pay toll to the market-owner for so doing, when by reason of the market being so crowded it was impossible to get nearer to the inside market, and he also proved such usage to hold the market on other days of the week besides on Thursday and Saturday:—

Held, that the market was a market without metes and bounds, and might extend, therefore, from time to time, as the crowded state of the market might require, over any of these surrounding streets, all of which were to be presumed to have been dedicated to the public subject to the exercise of the market franchise, notwithstanding the Paving Acts, as such Acts were not to be construed as interfering with the market rights:

Held, also, that the right to hold the market was confined to the two days mentioned in the charter of Charles II., and that under the particular circumstances of the case a lost grant for the other days of the week was not to be inferred.

THIS was a proceeding by way of information by the Attorney-General at the relation of the Board of Works for the Whitechapel district, by which it was sought to restrain by injunction the defendant, who was the lessee of Spitalfields Market, which was situate within that district, from selling, or licensing to be sold, or exposing for sale, goods in certain specified streets adjoining or near to such market.

The interior of the market, known as Market Place, occupied the centre of a square block of land and buildings, from the four sides of which ran at right angles therewith four streets called North Street, East Street, South Street, and West Street. In the outer area surrounding such block were four other streets—Lamb Street on the north, into which North Street ran, Brushfield Street on the south, into which South Street ran, Commercial Street on the east, into which East Street ran, and Crispin Street on the west, into which West Street ran.

The freeholders of the market, under whom the defendant claimed as lessee, derived their title to the market from a charter by letters patent dated the 29th of July, 1682, in the 34th year of Charles II.

This charter recited the finding by an inquisition taken under a writ of ad quod damnum, and then granted to John Balch, Esquire, in the said writ named, that he, his heirs and assigns, from thenceforth thereafter might have, hold, and keep two markets every week, whereof the first on Thursday and the other on Saturday, "in or next a certain place called the Spital Square" ("in sive juxta quodam loco vocato Spital Square") together with all tolls, dues, piccage, stallage, and other profits, advantages, and emoluments whatsoever to such market in any wise belonging or appertaining or with the same had or enjoyed.

A second charter, by letters patent dated the 22nd of September, 1688, in the fourth year of James II., after reciting the above charter of Charles II., and that all the title and interest of J. Balch in the same markets and premises had come to George Bonn, granted to G. Bonn two markets, one on Monday and another on Wednesday in every week, instead of the market on Thursday appointed by the charter of Charles II., and confirmed the market granted by such charter to be held on Saturday. This charter of James II., but not that of Charles II., was made void by 2 Wm. & M. sess. 1, c. 8, as appears from *Goldsmid* v. *Great Eastern Ry. Co.* (1).

In 1682, when the charter of Charles II. was granted, Balch had acquired the whole of the land which formed the square block above described, including what are now North Street, East Street, West Street, and South Street, which streets were made by Balch after he had obtained the charter. The whole of such block substantially answers to the land mentioned in the charter as Spital Square, it being described in the conveyance to Balch as "railed in and parcel of the fields called Spitalefields." It did not, however, appear that either of the grantees of the charters had ever acquired the land surrounding such block, and on which are now Lamb Street, Brushfield Street, Commercial Street, and Crispin Street, but all such streets were formed after 1682.

By 12 Geo. 3, c. xxxviii., certain commissioners were constituted and appointed to pave and repair, inter alia, the said streets—Lamb Street, Brushfield Street, Crispin Street, Red Lion Street (by which name Commercial Street was then called), and the four other streets—East Street, West Street, North Street, and South Street, and a penalty was imposed on any person who should place any cart or carriage in any of these streets so as to occasion an annoyance and should not immediately remove the same when required to do so, with power to the commissioners to sue them. And by 28 Geo. 3, c. lx., and 57 Geo. 3, c. xxix. (local), there were clauses prohibiting obstructions and nuisances in these streets, and imposing penalties on any one who should expose for sale a number of articles therein mentioned, or place any blocks, stools, or stalls upon any footway or carriage-way in the said streets.

These several streets, and the powers of such commissioners under these Paving Acts, became, by virtue of the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), vested in the Whitechapel District Board of Works, at whose instance these proceedings were taken.

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(1) 25 Ch. D. 511; 9 App. Cas. 927.

The board complained that the defendant had improperly extended the area of the market, and had taken tolls and given licences to persons to bring and keep their carts and expose their goods for sale in the above described eight streets, which were all considered by the board to be beyond the proper limits of the market, and that this had been done not only on the days mentioned in the above charters, but on every day in the week except Sunday.

There was uncontradicted evidence given at the trial that from the time of living memory salesmen had brought their carts with fruit or vegetables to Spitalfields Market on the market days, and that when they could not get inside the market in consequence of its being full, they stood and unloaded their carts and sold their produce in any of the four streets, Commercial Street, Crispin Street, Lamb Street and Brushfield Street, as the case might be, but as near to the inside market as they could get, and that they paid tolls to the market owner for what they so sold in these streets. The market days were proved by such long usage to be Tuesdays, Thursdays and Saturdays, but that occasionally, especially in the summer, fruit and vegetables were sold also on the other days of the week, and tolls taken in respect of such sales. On the part of the prosecutors, evidence was given of persons having been summoned for obstructing the traffic of these streets with their vegetables and articles for sale, but the convictions were not produced, and there was nothing to prove that the obstruction complained of occurred during the market hours. The action was tried at Middlesex during the Hilary Sittings of 1884, before Stephen, J., who was of opinion that Tuesdays, Thursdays, and Saturdays were the market days, but that the market and market rights did not extend beyond the market buildings and North Street, South Street, East Street and West Street, and that the defendant and his lessors had no interest in or right to hold markets in the external streets, and accordingly that learned judge gave judgment for the plaintiff, and granted a perpetual injunction restraining the defendant and his servants and agents from selling or exposing for sale or from giving leave or license to set or expose for sale any goods in Commercial Street, Crispin Street, Lamb Street, and Brushfield Street, and also granted such injunction restraining the defendant and his servants and agents from doing any of such acts in North Street, South Street, East Street and West Street on any days of the week, other than Tuesdays, Thursdays and Saturdays.

The defendant appealed. The plaintiff gave notice that upon the hearing of the appeal it would be sought to vary the learned judge's decision by extending the injunction to North Street, South Street, East Street and West Street on all days of the week.

Sir *H. Giffard, Q.C.*, and *Crossley, Q.C.* (*J. M. Solomon*, with them), for the defendant. The case of this very market came before the Court of Appeal and afterwards the House of Lords in *Goldsmid* v. *Great Eastern Ry. Co.* (1), and it was there incidentally determined that the charter of Charles II. was valid, though not that of James II., and that it gave the franchise to hold a market to those under whom the defendant in the present action derives his title as lessee. The market is not limited by metes and bounds as the learned judge at the trial seems to have considered it. The franchise is to hold the market "in or next to" "in sive juxta" Spital Square, and is therefore not restricted to a specified spot: *Dixon* v. *Robinson* (2). The learned judge at the trial was of opinion that it was necessary to consider what land the grantee of the charter of Charles II. had at the time of such grant "in or next to Spital Square," because he said the charter could not give him a right to hold a market in land which belonged to other people. That is not correct in law, for it is not illegal for the Crown to grant the franchise to hold the market on land which is not the property of the grantee: *Lockwood* v. *Wood* (3). The grantee may afterwards acquire the ownership of the soil, or he may hold the market with the license of the owner. In *Lockwood* v. *Wood* (4) Lord Denman in

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(1) 25 Ch. D. 511; 9 App. Cas. 927.

(2) 3 Mod. 108.

(3) 6 Q. B. 31.

(4) 6 Q. B. at p. 46.

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giving the judgment of the Court said that the grantee of the charter "could not claim stallage unless he had a place to hold the markets and fairs either by gift of the Crown or by having the manor, and as such having a general range of places to hold the fair and market, or by having land, either freehold or otherwise, in it, in any of which cases he could claim stallage at whatever time after the charter of the Crown he should become interested in the lands. If he never was so interested, he might nevertheless hold the fairs and markets on land belonging to other persons by their mere sufferance and permission, but unless he had the actual possession of it he could not claim stallage." Markets have often been held in a public street, "where," said Lord Tenterden in *Mosley* v. *Walker* (1), "most ancient markets were held." Then there was proved in the present case a long user of the market upon other days of the week besides the Thursdays and Saturdays mentioned in the charter of Charles II., and such user was amply sufficient for presuming a grant for those other days, for every intendment ought to be made in favour of long established usage: *Mayor of Penryn* v. *Best* (2), *Rex* v. *Smith* (3), and *Lawrence* v. *Hitch* (4). The Paving Acts of Geo. 3 are not applicable, they are only against unlawful obstruction in these streets, and do not give any right to prevent the holding of the market, the obstruction occasioned by which would be lawful. This was the opinion of the Court of Appeal and of the Lord Chancellor in *Goldsmid* v. *Great Eastern Ry. Co.* (5).

Finlay, Q.C., and *Colt*, for the plaintiff. The learned judge at the trial put a right construction on the charter of Charles II. The charter was only intended to operate on the land that Balch, the grantee, then had in the place mentioned in the inquisition under the writ ad quod damnum, where the market was to be held. Littledale, J., expressed a strong opinion in *The King* v. *Starkey* (6) that the lord of the market must be the owner of the soil in which the market is held. "The lord," he says, "is to have the correction of the market, but how can he have that when he has not the soil?" And again he says, "I am of opinion, therefore, that the market was not well removed, the soil of the place to which it was removed having been parted with by the owner of the franchise; the lord could not in such case sue for the disturbance of the franchise, for the consideration which he gives to the public for the market is the correction which he exercises, and that he cannot exercise where he is not owner as well as lord." So in *Mosley* v. *Walker* (1), Bayley, J., says, "If the place once allotted ceases to give reasonable accommodation, he" (the grantee) "is bound, if he has land of his own, to appropriate land on which to hold it; or if not, to get land from other people, in order that the market, which was originally granted for the benefit of the public as well as for the benefit of the grantee, may be effectually held." So the grant is usually to the lord of the manor, and therefore to one who is the owner of the soil where a market is to be held: *Curwen* v. *Salkeld*. (2)

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(1) 7 B. & C. 52.

(2) 3 Ex. D. 292.

(3) 4 Esp. 110.

(4) Law Rep. 3 Q. B. 521.

(5) 25 Ch. D. pp. 544, 547, 554; 9 App. Cas. p. 942.

(6) 7 Ad. & E. at pp. 106, 107.

[Brett, M.R. But suppose he has the licence of the owner of the land to hold his market.]

That would of course make the case different. What the learned judge meant at the trial of the present action was that the Crown could not by the charter give a person a right to use the land of another person for the market, and therefore he was of opinion that the charter was to be limited as operating only on the land Balch then had, which was confined to the square, for, as that learned judge thought, Balch never did acquire any right to hold the market beyond such square. The Paving Acts of Geo. 3 are used by the plaintiff as shewing that as a matter of history the right to hold the market in the streets mentioned in those Acts (which include the eight streets in the present case) did not exist, for those Acts expressly prohibit the exposure for sale of goods in those streets without any allusion to market rights. Besides, those Acts take away the market rights in those streets, and that that is the right construction of them, although no compensation is given by them to the market holder, is shewn by *Hammersmith Ry. Co.* v. *Brand* (3), and the opinion

(1) 7 B. & C. 55.

(2) 3 East, 538.

(3) Law Rep. 4 H. L. 171.

of Lord Blackburn in commenting on that case in *Metropolitan Asylum District* v. *Hill.* (1) Even the four streets made in the square block by Balch were dedicated to the public without reservation of the market rights, for the market proper was confined to the centre of such square, where the market-house was erected. As said by Jessel, M.R., in *Mayor, &c., of Manchester* v. *Lyons* (2), "the market is the proper market, and the fact that some persons improperly sell provisions in the street outside does not extend the market." The learned judge was therefore wrong in that respect in not extending the injunction to the four inner streets. After a street has been dedicated to the public the Crown cannot grant a market to be held there.

[COTTON, L.J., referred to *Mosley* v. *Chadwick* (3), where a case is cited from the Year Books of a market in the High Street in Dunstable. Moreover, in *Goldsmid* v. *Great Eastern Ry. Co.* (4), the Lord Chancellor, after referring to the question upon the Paving Acts of Geo. 3, said: "Certain things, which in the absence of market rights might be nuisances in public streets, were treated as nuisances which the local authority might abate in those Acts of Parliament." The Lord Chancellor there assumed that there were market rights which might be had in these very streets.]

The defendant ought at least to shew that he, or the person under whom he claims, has acquired from the owner of the soil the right or permission to hold the market there. The evidence of usage failed to shew that the market has been held as of right in any of these eight streets, on the contrary, it was shewn that the exercise of the market rights in these streets has been objected to from time to time, and persons have been summoned for selling there. Whatever may be the meaning of the words "in sive juxta" in the charter of Charles II., it is not of that wide extent which is sought to be put on those words by the defendant. With regard to the right claimed of holding the market on Monday, Tuesday, Wednesday, and Friday, as well as on the days mentioned in the charter of Charles II., the origin of the market is known, and therefore no evidence of usage from which a lost grant to hold the market on the other days should be presumed, ought to be allowed to prevail.

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(1) 6 App. Cas. 203.

(2) 22 Ch. D. 306.

(3) 7 B. & C. 47, n.

(4) 9 App. Cas. at p. 942.

[They also cited 1 Russell on Crimes, 4th ed. p. 415.]

Sir H. Giffard, Q.C., in reply, cited Fitz. N. B. 523, title "writ de libertatibus allocandis," as to what grants the Crown may make without the assent of Parliament.

BRETT, M.R. The substantial question in the cause is whether the defendant has the franchise of a market which authorizes him to do what he has done. What he has done is this, within certain streets, four of them being what I call the inner streets, and four the outer streets, he has given licences to people to sell vegetables and fruit during certain hours of the day from their waggons and carts, or otherwise, and he has taken toll in respect of that authorization.

The defendant put his case in two ways. He gave evidence of the contents of a grant from the Crown of a market in particular terms, and he also gave evidence by witnesses of a usage without interruption for as much as forty-five years of the right to give these licences, and of the rights of the people who took the licences to act under that authorization. Stephen, J., construed the charter of Charles II. (which had been granted to the predecessor in title of those under whom the defendant claimed) to be the franchise of a market only within what may be called the block or square, including the four inner streets. He first of all decided what he considered to be the construction of the words of the grant, and then he took another ground, which was that no franchise can be granted by the Crown of a market except to a person who at the time of the grant is the owner of the land on which the market is to be held.

Having laid down those two propositions, he came to the conclusion as to what were the limits of the market.

Now I am sorry to say that I cannot agree with either of his propositions of law. According to his interpretation the grant was a grant of a market only in the place named, that is to say Spital Square; but that strikes out the words "sive juxta" and gives them no meaning at all. The grant though drawn up in Latin was an English grant, and the words "in sive juxta" mean "in or near." An attempt was made to draw a distinction between "next" and "near," but what distinction there can be in that respect in such a grant I cannot conceive, and the words therefore must be treated as meaning "in" or "near" to the place named. The grantee may hold the market in the place named or near to it. If you expand it in that way it includes both obviously. It is contrary to a canon of construction of a grant or other document which confers a right to strike out words unless you are absolutely obliged to do so. The only way in which the learned judge arrived at the conclusion that he ought to strike out these words "sive juxta" was because he was of opinion that no grant of a market could be made to a person except in respect of land which he then owned, and therefore he said the words "sive juxta" were too large, because by the ordinary interpretation that would give the grantee the franchise over land of which he was not the owner. This brings one to consider this question. Is it true that the franchise of a market cannot be granted by the Crown to a person except in respect of land of which he is then the owner? Now the grant does not assume to grant any land or any interest in land. It grants the franchise of holding a market and authorizes a market to be held, and it does so after inquiry by a peculiar proceeding, whether the granting of the market will be for the good of the public or to their detriment; therefore there seems to be no reason why the grant should be confined to the land of the person to whom it is made. But it seems to me that upon authority it is not true to say that it is so confined. I think what was cited from Lord Tenterden in *Mosley* v. *Walker* (1) shews that in his opinion the franchise of a market was not confined to a person who was the owner of the land on which it was to be held. There is also the case of *Lockwood* v. *Wood* (2), in which it seems to me that Lord Denman in delivering the considered judgment of the Court really said the same thing. I am therefore of opinion both on principle and authority that the grant of a franchise of a market has nothing to do with the ownership of the land by the person to whom it is granted. After such person has obtained the franchise he must hold the market in the place specified in the grant if it is a market confined by metes and bounds, and if he cannot obtain the property on which to hold the market in that place, or he is prevented by the owner of the land on which he must hold the market from holding it there at all, then the only thing is that his franchise has become useless to him. So if the market be one granted without metes and bounds, if he cannot obtain by sufferance or otherwise the opportunity of holding the market at or near the place in respect of which the franchise is given him he is prevented from holding his market; but it does not do away with the grant of the Crown. The grant is always existing, and even though he could not hold the market at the moment after the grant was made to him, yet if he afterwards obtains the power and opportunity of holding the market at the place where the franchise gives him the right to do so, I see no reason why he should not hold it there at any time. Then as there is no reason for striking out the words "sive juxta" and they must remain, what is the true construction of the grant? It is a grant of the franchise to hold a market in the place named, and also near to such place, that is to say, it is a market without metes and bounds. What is then the extent of a market which is granted without metes and bounds? It seems to me that such a market extends so far as reasonable convenience from time to time requires that it should extend. If for a time the market is actually held reasonably within a limited space, then during that time that space is the extent of the market, but if the market continually expands, so far as it extends in fact and honestly that is the market from time to time. But it was urged that, even if that were so, the market cannot be held in certain places in this district, because it was said that those places had been dedicated as streets to the public, and that there had been an Act of Parliament which appointed commissioners and vested in them the freehold of these streets and gave them power to prevent obstruction there, including the obstruction which would be the inevitable result of the defendant granting the licences to sell goods from carts and waggons in such streets. With regard to that it was answered that the streets were dedicated after the granting of the franchise, and that, taking that fact and the evidence that for so many years from this date backwards, the streets have been used without real interruption (except in respect of something done by the police), we ought to hold that the streets were dedicated subject to the franchise, with the intention therefore that the market should not be interfered with. Now first, with regard to the inner streets. They were made after the market franchise was granted and by the person to whom it was granted, and, as it is said, for the purposes of the market. It seems to me to be contrary to good sense to suppose that a man who had obtained the franchise of a market should directly after he had obtained it go and destroy it, by dedicating his own property to the public so that the public should prevent him from holding the market there. Therefore it seems to me, with as near a certainty as one can get, that with regard to these four inner streets the owner of the land who dedicated them as streets dedicated them subject to the franchise of the market. Then as regards the four outer streets, though they were not dedicated by the owner of the market franchise, they were dedicated in a particular neighbourhood, of which I think the market was the principal feature, a market moreover which was then being carried on in the four inner streets, and which therefore was known to be not confined merely to what may be called the inner market; so that I think it would not be unnatural to suppose that the people who laid out and dedicated these four outer streets to the public did so in order that the house space next to such streets might become more valuable in such a neighbourhood, as shop property, and when one knows as matter of business that people are not unwilling to have shops in the neighbourhood of a market, it seems to me that the real inference to be drawn with regard to the four outer streets is that the people who dedicated those streets took into account the fact of the market, and dedicated the streets subject to the market rights over them. Then, there being these streets, and, at all events, the four inner ones, dedicated subject to the market franchise, unless Parliament has interfered and taken away from a man what was granted to him by the Crown, these streets would remain subject to the franchise. It was, however, urged, and very strongly, on the part of the plaintiff, that the result of the Paving Acts of Geo. 3 was to interfere with and take away the rights of the owner of the market franchise. Now it is to be observed that if those Acts have

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(1) 7 B. & C. at p. 52.

(2) 6 Q. B. 31.

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taken away and interfered with such rights they have done so without giving any compensation, and it seems to me that it is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it. If it is clear and obvious that Parliament has so ordered, and there is no other way of construing the words of the Act, then one is bound to so construe them, but if one can give a reasonable construction to the words without producing such an effect, to my mind one ought to do so. Can one then give a reasonable construction to these Acts without coming to the injurious supposition which has been contended for? It seems to me one can. It is obvious that this market does not last the whole of any day, and nothing would be more likely than that the people who had during the market the licence of the defendant under the franchise to stop the thoroughfares by their carts, would be apt to do so after market hours, and it might be right that then the local authority should have power to interfere. Therefore there is plenty on which these Acts of Parliament might act without doing anything injurious to anybody, and consequently it seems to me the true way of construing them is to say that they do not interfere with the rights granted by this franchise. I find that this very point was before this Court and the House of Lords in *Goldsmid* v. *Great Eastern Ry. Co.* (1), and that this Court and also the Lord Chancellor were of opinion that these Paving Acts of Geo. 3 had no effect whatever on the franchise.

Then comes the other matter, which is this, on what days does the grant of Charles II. give leave to hold the market? It seems to me clearly it only gives it on two days in the week, and that with regard to that one cannot by any usage, however long, alter the construction of the grant. Therefore I think that the market is confined to the two days in the week named in that grant. But then it was urged, on behalf of the defendant, that there was strong evidence of usage, and so there was, of the market being held on the other days of the week; and that that being so, we ought to infer a lost grant, that is to say, that we ought to infer that the Crown had made another grant of a similar market with the same terms for the other four days in the week. I was inclined to give great weight to that, and I will not say, if my learned Brethren had come to a conclusion to that effect, that I would not have acquiesced in it; but there is here another charter which has been held to be bad, and, seeing that the usage relied on may be only an extension, without objection, of the market being held beyond the days granted by the charter of Charles II., and that it is consistent with acting under the charter of James II., which has been held to be void, I do not think it right to draw the inference that there has been a market granted by a separate grant of the Crown for the other four days. Therefore it seems to me the defendant's right of market is confined to the two days named in the charter of Charles II., but that that market franchise being an expansive one without limits, it authorizes him on those two days, during market time, to take tolls in respect of licensing people to sell their goods, not only within the four inner streets, but also within the four outer streets, and wheresoever from time to time this market may honestly be in fact extended. If that be true, it is not necessary to give any decision upon the point whether the Crown could grant the franchise of a market to be held in public streets existing before the grant, or in streets which are not dedicated subject to the franchise. I, for myself, however, give no countenance to the supposed doctrine that the Crown could not grant validly a franchise for the public good to hold a market in the public streets, for I think it might be well argued that the Common Law has entrusted to the King the exercise of such prerogative for the benefit of the public, making the Crown, after an inquiry, the sole judge of whether it is for the benefit of the public to grant the franchise or not. The result is, that the defendant succeeds in maintaining his market for the two days to the full extent, whilst those who are acting under the name of the Attorney-General have succeeded in shewing that the defendant has exceeded his franchise by licensing people on the days which are not named in the grant of Charles II.

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(1) 25 Ch. D. 511; 9 App. Cas. 927.

COTTON, L.J. The defendant here has a long lease of market rights which are enjoyed by the freeholders of certain lands, and he is also entitled to the benefit of the charter of Charles II. There seems to me to be two questions, first, as to the place in which the franchise granted by Charles II. can be exercised; and secondly, on what days in the week it can be exercised? As to the first we must consider whether this charter is one the exercise of which is limited to a piece of land defined by metes and bounds, or whether it is free from that restriction? Of course that depends on the construction of the charter. It is difficult perhaps not to feel that to a considerable extent the point was decided in the previous case of *Goldsmid* v. *Great Eastern Ry. Co.* (1). It was not essential to the decision of that case, but still it was a point on which this Court and the House of Lords both expressed an opinion that the market was not to be considered as a market limited by metes and bounds. Let us look at the words of the charter. It is a charter granting the right to hold a market on two days in the week "in sive juxta" a place called Spital Square. Now we know that in 1648 there had been a grant of a piece of land which is the piece of land comprised in the lease to the defendant, on condition that it should be kept as an airy place, and if inclosed at all it should be with posts and chains. That part of London then was open fields, but in 1681 I presume it was becoming more populous and that there was a necessity for a market. Spital Square was no doubt that part of the land which was so conveyed in 1648, and the contention on the part of the respondents and the view of the learned judge at the trial was that those words "in sive juxta" in the charter certainly confined the right to exercise the franchise of a market within that piece of land. In my opinion according to the recognised canon of construction the learned judge was wrong. A market is to be exercised in that place "sive juxta" or near. In one sense it is a grant of the franchise of a market limited to the place in which it is to be exercised, that is to say, it is to be in or near Spital Square, but to say that it should not be exercised at all beyond its limits would be to entirely disregard those words "sive juxta." If it was meant to say that all that was granted was the right to exercise the franchise in Spital Square, the word "in" would have been amply sufficient and would have been alone used, and I cannot conceive any one would have added the words "sive juxta" unless it had been intended that, if the necessities of the market reasonably required it, the owner of the franchise should have a right to exercise his franchise not only in that land which was conveyed in 1648 to his predecessor in title, but on that land which was next to and adjoining it when it would be necessary for the purpose of the market. The learned judge, however, held that that was not the construction of the grant, for the reason that the Crown, he said, cannot grant the franchise of a market except where it is to be held on land belonging to the grantee, and therefore those words "sive juxta" were to be disregarded, because all that belonged to the grantee when the charter was granted was Spital Square. Now I differ from him in that as a matter of law. It is very true that there are certain rights generally granted to the grantee of a market franchise which cannot be exercised except where the soil is his own property, such as stallage. But there are tolls, and although the market would be inconvenient unless the person to whom it was granted had some right granted to him by those who owned the soil, yet in my opinion it is not law that no market franchise can be granted except to one who possesses the soil on which it is to be exercised. It is very true that as against the owner of land the Crown cannot by its grant enable anyone to take that land and use it either for the purposes of a market or anything else. But that is not the question here, what we have to consider is whether, because at the time when this grant was made the grantee only had Spital Square, we are to say that the franchise cannot be exercised anywhere else. In my opinion that would be a wrong construction of the grant. Spital Square no doubt represented the place where the head of the market was to lie, but there was nothing at all to prevent the grantee at that time from acquiring other land. That being so, what is there near and around this square? There are four public streets, and intersecting at right angles there are also four other public streets. The question is whether under that grant the grantee can exercise his right of franchise in the four streets which intersect the block of which he was the owner, and then whether he can do so in the adjoining streets? Now, in my opinion he can do so in both. The learned judge in the court below has said he can do so as regards the four streets which intersect the block, but that he cannot do so in any of the outer streets. Now, what do we know about these outer streets? It is agreed that at the time when this franchise was granted they had not been laid out as streets and had not been dedicated to the public. That being the state of things, I think the conclusion at which the Master of the Rolls has arrived is correct, namely, that these outer or surrounding streets were dedicated to the public subject to such an interference as the exercise of the market franchise would cause. Although at the time of the grant it was not reasonably necessary for the purposes of the market that the owner of the market should exercise his franchise in these streets, yet to my mind the conclusion is pretty evident that the owners of this surrounding property when laying out their property did dedicate these streets subject to such rights as might be necessary to the exercise of the franchise in them when the population increased and the place became populous. What then is the limit of the market? May people go half a mile away, stop their carts and say, "*this*" is within the market, and we may stop and sell our vegetables there? No. But if those who frequent the market fill and occupy the central market square, where the market-house is, they may then extend themselves reasonably, and occupy the streets continuously from the market-house which is in the centre of the market. Under the charter the franchise can be exercised on all the places adjoining the central block where the owner of the land had either dedicated it to the public subject to the franchise or was willing to allow the grantee to exercise his franchise over it, going continuously from this central block as far as was reasonably necessary for the purposes of the market. The inside streets are undoubtedly found by the learned judge to be within the place where the franchise was to be exercised, and to my mind when the owner of the franchise was building the market-house or shed in the central market square it is impossible to suppose that he would so dedicate those four streets, North Street, South Street, East Street, and West Street, to the public as to preclude himself and his successors from exercising his franchise. Therefore I do not differ with the learned judge as to those four streets. I would add that I do not withdraw from what I said in *Goldsmid* v. *Great Eastern Railway Company* (1) about holding a market in a street not being a nuisance when it is done in the exercise of a franchise though without a franchise authorizing it it would be a nuisance. I see that in that case Fry, L.J., also says in his judgment (page 554), "It is plain that the right to obstruct the streets which is incident to the existence of a market cannot for a moment be considered as a nuisance." Then it is said that the Whitechapel Board of Works are the successors of certain commissioners who had authority under certain Acts of Parliament in the reign of George III., and that whatever rights the defendant might have under the franchise, these Acts of Parliament interfered with them. In my opinion that is not so. These Acts were intended not to make anything illegal which was legal at the time they were passed, but only to enable the commissioners summarily to restrain and interfere with certain things being done in the streets which but for the franchise would be a legal nuisance. Of course it is obvious if the market was only to be held on certain days these Acts of Parliament would have full effect given to them by enabling the commissioners to interfere with persons who were doing on non-market days that which they could only do legally on market days. On this point the view I take of these Acts of George III. is in accordance with that expressed by the Lord Chancellor in *Great Eastern Railway Company* v. *Goldsmid* (2), and also that of every member of the Court of Appeal when that same case was before it. (3) Then comes the question whether the right of the owners of the franchise and their lessee is limited to certain days. It is limited in the charter of Charles II. to Thursday and Saturday, but apparently the market has in practice been carried on every day of the week, and certainly it has not been confined to the two days mentioned in that charter. It was pressed upon us that having regard to the evidence of usage which was given at the trial we ought to hold that there was some grant from the Crown of a market on those other days. In my opinion that is wrong. If it were merely a question

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(1) 25 Ch. D. 511; 9 App. Cas. 927.

(1) 25 Ch. D. at p. 544.

(2) 9 App. Cas. pp. 942, 943.

(3) 25 Ch. D. pp. 544, 547, 554.

whether there was a grant or not, then this usage in my opinion would be sufficient, and we ought to hold that there was a grant authorizing the doing of that which has been shewn to have been done for so many years. But here there was produced the charter of Charles II., and it would not be right in my opinion as regards that charter to presume a lost charter simply from the evidence of what has been done, especially when we know that until the case of *Goldsmid* v. *Great Eastern Railway Company* (1) the grantee of the market relied on the grant of James II., which gave him another day. I therefore come to the conclusion that there was no grant by the Crown giving a right to exercise the franchise on other days than those mentioned in the only good charter, namely, that of Charles II. That being so, there is only one other matter which remains to be disposed of. Though the Crown may grant the franchise of a market to be exercised on another man's ground, such grant cannot be exercised against the will of the owner of the land, and it was said that we must treat this as a case in which the owners of the streets are interfering as owners and asking for relief, and that as against them this grant must be inoperative. In the first place, it is to be observed that this is simply an information, and not an information and action as it might have been, but I think, going to the substance of the case, that if this had been an information and action we ought not to give the district board, as owners of the soil, any relief by way of injunction. There is no possible injury to them as such owners. The soil in the streets is vested in them simply as owners of it as a public thoroughfare for the purposes of the public, and in my opinion there is no damage sustained by them as owners of the soil which would justify us in making any decree in their favour in a case of this sort, in order to stop the market being exercised over that place which is now by the increase of the population necessary in order to make the market effectual.

LINDLEY, L.J. I quite concur in the decision which has been arrived at. The case has been so fully gone into that little remains for me to add. The question is an important one, and it

(1) 25 Ch. D. 511; 9 App. Cas. 927.

really resolves itself into two inquiries: first of all, what are the rights of the grantee of this market under the charter of Charles II. and under the usage which has been proved; and, secondly, to what extent are those rights affected by the Paving Acts of George III.? Now by the charter of Charles II., which is the only charter now available, the grantee obtained the right to the franchise of the market in and near Spital Market for fruit and vegetables on Thursdays and Saturdays. That is what the charter granted him. At the time the charter was granted the grantee had acquired a certain plot of land, which may be called Spital Square. I pause here to consider what that means. It means that, charter or no charter, franchise or no franchise, he could buy and sell vegetables on that square like anyone else, because he was the owner of the square. Then the charter granted him a monopoly, which is what a market franchise means, and that grant was to be enjoyed by him in or near Spital Square, unless we reject the words sive juxta, as the learned judge in the Court below has done, as meaningless; but this I cannot think right. That learned judge has construed the charter as if it only granted to Balch a franchise to be exercised on a square block of land of which he was the owner, and the controversy and struggle on the part of the local board have been to confine the defendant as lessee of this market franchise to that square block, and indeed to something less than that, viz., to the centre part of it which is covered with market sheds. Now the construction of the charter is what I have before said; and is in accordance with the view taken by the Court of Appeal and the House of Lords in *Goldsmid* v. *Great Eastern Ry. Co.* (1) It is said the Crown cannot grant a market franchise to a man to be exercised off his land. That seems to be the root of Stephen, J.'s, judgment for holding that the charter should be construed restrictively, but I think that is wrong, and that it is so is shewn by *Lockwood* v. *Wood.* (2) Of course the Crown cannot grant a right to go on somebody else's soil to exercise such franchise. The grantee must get that right by license or by grant or otherwise, and then he can exercise the franchise. Whether the Crown can by charter grant a man a right to hold a market in a public street so as to obstruct

(1) 25 Ch. D. 511; 9 App. Cas. 927.

(2) 6 Q. B. 31.

the thoroughfare is a point about which I have some doubt; but as it does not arise in this case I will say no more about it. Then the true construction of the grant being such as I have stated, let us see to what extent it goes. It would warrant Balch, the grantee, and his successors in holding a market on the whole of the land that he then had, which included what are North Street, South Street, East Street, and West Street. The words "sive juxta" would authorize the extension of that market beyond those limits with the consent of the owner of the land adjoining. We are in a state of uncertainty as to exactly what was done between the granting of the charter and the passing of the Paving Acts of George III. The recitals in these Acts shew that North Street, South Street, East Street, and West Street then existed. They had been made on the block of land owned by the grantee of the charter and had been thrown open as public streets. The recitals also shew that Commercial Street and some other streets existed in the neighbourhood, but when Commercial Street and those other streets were first formed we do not know, and we do not know with anything like accuracy to what extent, if at all, the market had overflowed before these Paving Acts of George III. came into operation. All that is obscure, but we do know as a fact that the market rights have been exercised for a good many years in Commercial Street and the three other outer streets, and my opinion is that we ought to infer from the evidence that these rights were in fact exercised over those four outer streets with some consent or other of the owner of the land when those streets were dedicated to the public. Therefore we come to this, that at the time of the Paving Acts of George III., as far as we can ascertain, the market existed and existed in those four streets, North Street, South Street, East Street, and West Street, and judging from comparatively modern user I come to the conclusion that the other streets had been dedicated subject to the right to use them for market purposes if and when required.

Now as to the Paving Acts of George III., they are certainly very startling, for if the words of them only are looked at, the whole of the market-place, including the open spaces and streets, would be vested in the commissioners, with a right to put down this market. I need hardly say that that is a conclusion that nobody would arrive at unless driven to it. Accordingly it was decided by the Court of Appeal in *Goldsmid* v. *Great Eastern Ry. Co.* (1), and was not dissented from by the House of Lords, but rather the contrary, that the true construction of these Paving Acts is that they must be interpreted so as to be consistent with the existence of the market rights whatever those market rights are. There is no difficulty at all in carrying out that construction, because the market rights are exercisable only on Thursdays and Saturdays, and the Acts give the commissioners power to keep order and prevent obstructions in the streets on the other days and also on those market days except during market hours. The result is, that the paving commissioners and the local board in whom these streets are vested can only exercise their rights in subordination to the market rights, and those market rights are not limited to the covered market-place, nor even to North Street, South Street, East Street, and West Street, but extend juxta or near Spital Square into the four surrounding streets that have been mentioned.

As regards the days of the week for holding the market, as I have already said, the days mentioned in the charter of Charles II. are Thursday and Saturday. There was the charter of James II. giving a right to exercise this market on Monday and Wednesday instead of Thursday. So that whilst those two charters were in force the grantee would have had the right to exercise these market rights on Monday, Wednesday, and Saturday. Then there was the Act 2 Wm. & M. sess. 1, c. 8, which rendered the charter of James void, so that the grantee can rely only on the charter of Charles II. We have, however, been asked to infer from the usage proved, shewing that market rights have been exercised every day of the week, that there has been some charter granting the right to exercise such rights on those days. I think that if we did so we would be going further than we are bound or ought to go. The cases which have been referred to in support of presumptions from long usage will be found to have been cases where the origin of the rights said to exist has been lost in obscurity, and there has been nothing but the evidence of immemorial user. Here that is not so. We know the origin of the

(1) 25 Ch. D. 511.

franchise which is claimed, and therefore I come to the conclusion that we must hold this franchise restricted as far as the days are concerned to Thursdays and Saturdays; but of course that will not interfere with the owner of this market-place from selling on other days. He has a right to sell, but he will not have his monopoly. His market franchise must be confined to Thursdays and Saturdays.

Decision reversed.

Solicitors for plaintiff: *Turner & Son.*
Solicitor for defendant: *S. Betteley.*

W. P.

[IN THE COURT OF APPEAL.]

Dec. 2.

THE LANCASHIRE AND CHESHIRE TELEPHONE EXCHANGE COMPANY, APPELLANTS; THE OVERSEERS OF MANCHESTER, RESPONDENTS.

Poor-rate—Telephone Company—Rateable Occupation—"Wayleaves"—Overhead Wires and Apparatus attached to Roofs and Chimneys of Houses.

A telephone company were possessed of an exchange by means of which subscribers could communicate by telephone with each other, and also of wires and telephone apparatus unconnected with the exchange for the use of persons renting them. For the purpose of this business they laid wires from their office to the business premises of their subscribers, and also erected wires for the use of those who rented them. All these wires were overhead wires and were carried from the office of the company to the different premises, being supported and steadied either by poles fixed in the ground, or by being attached to the roofs, chimneys, or walls of some of the buildings over which they passed. The attachments were made in the case of a single wire by an iron spike driven into the building, or by a bolt screwed into the ridge, or by an iron bracket nailed to the corner of the chimney to which the wire was attached, or in the case of a number of wires by means of standards or ridge-saddles attached to the roofs of the buildings and fastened by iron bolts or stays. The consent of the owners or occupiers of the land or buildings was given by agreements in which the company undertook to pay an annual rent and to remove the wires and attachments, upon a certain notice. The company had no key of the outside doors, and could only obtain access to the roofs by the permission of the occupiers:—

Held, affirming the decision of the Queen's Bench Division, that upon these facts there was proof of an occupation of land by the wires of the company, and that they were rateable.

APPEAL from the decision of Mathew and Day, JJ., on a special case stated for the opinion of the Court under 12 & 13 Vict. c. 45.

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LANCASHIRE TELEPHONE COMPANY *v.* OVERSEERS OF MANCHESTER.

The facts of the case are fully set out in the report of the proceedings before the Queen's Bench Division (1), and it is only necessary to refer to the short statement of them in the head-note to this report, and to state that the Queen's Bench Division held that the company's telephone posts, standards, ridges, saddles and other attachments and supports for wires, and the wires attached thereto, were rateable to the poor-rate, and that the company had a rateable occupation of the same.

The company appealed.

R. Henn Collins, Q.C. (*R. E. Webster, Q.C.*, and *Bradbury*, with him), for the appellants. The appellants do not dispute their liability to be rated in respect of their occupation of the principal or central office in Faulkner Street, but the question is as to their liability to be rated in respect of the overhead wires and their supports which are attached to the chimneys and roofs of houses. The appellants have not and cannot have the exclusive and independent use of these, since such houses are not in their occupation but of other persons. The present case is different from that of *Electric Telegraph Company* v. *Overseers of Salford* (2), on the authority of which the Divisional Court gave judgment for the respondents, because there the telegraph company's posts were fixed in the land along the line of railway, and they were therefore held to be the occupiers of the portion of the land in which the posts were placed. *Watkins* v. *Overseers of Milton near Gravesend* (3) shews that a licence to a person to fasten and keep fastened a coal bulk to certain moorings placed in the Thames by the Thames Conservators did not constitute such person liable to be rated to the poor-rate as occupier of part of the bed of the river; and Lord Blackburn, then Mr. Justice Blackburn (at p. 354), distinguished it from the case of *Electric Telegraph Company* v. *Overseers of Salford* (2), saying, that "there the electric telegraph company occupied the land by means of their posts, but that case does not decide that an easement can be rated. If the facts there were that the railway company, the owners of the land, should place posts on their land, and the telegraph company should be at liberty to fix wire into the posts it would be like this case." That is exactly the present case, and there is therefore the high authority of Lord Blackburn that the appellants are only licensees, having an easement and not a tenement, and therefore not liable to be rated. No doubt so far as the wires are carried over land attached to poles fixed to the ground, it must be admitted that the case is not distinguishable from *Electric Telegraph Company* v. *Overseers of Salford* (1), and unless the Court of Appeal will overrule that case the appellants cannot succeed as to the wires attached to poles on the land, but as to the wires attached to chimneys and roofs the occupiers of the houses remain the occupiers of the chimneys and roofs, and there is nothing in the agreement with the appellants by which any portion of the building is demised to them; they have merely a licence to use such building for passing their wires over the land, and in principle it is not distinguishable from the licence to use a railway platform for bookstalls: *Smith* v. *Lambeth Assessment Committee* (2); or the licence to affix a hoarding: *Reg.* v. *St. Pancras* (3); or the licence to sell refreshments in a particular place: *Reg.* v. *Morrish.* (4) The difference between such licence, which gives the grantee only an easement, and the user of property fixed to the soil, which makes the owner of such property the occupier of the soil, is shewn in *Cory* v. *Bristow.* (5)

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(1) 13 Q. B. D. 700.

(2) 11 Ex. 181.

(3) Law Rep. 3 Q. B. 350.

Ambrose, Q.C. (*Smyly* with him), for the respondents. It appears from the case that the two ends of the wire are fixed, the one on the appellants' own premises and the other on the premises of the subscribers, and by the wire which goes overhead the appellants occupy so much of the land as the wire covers—just as much as water and gas companies occupy land by their water and gas pipes. [He was then stopped.]

Henn Collins, Q.C., in reply.

Brett, M.R. The real question seems to me to be—having regard to the spikes and brackets which are affixed to the houses for the purpose of carrying the wires, which are attached to them—whether the company are rateable in respect of all those things, the whole apparatus, affixed to the houses. How are they affixed? They are affixed to brickwork or to wooden saddles solidly fixed to brickwork. What is it that keeps them where they are? It is not merely the screws or the things which affix them, but the building to which they are affixed; not every part of such building, but so much of it as is really necessary to support them, and which building is itself supported by the land into which it is fixed. Therefore it seems to me that each of these things is a thing which is fixed to the soil in order to support it where it is. If you take so much of the building as is necessary to support these things, and so much of the land as is necessary to support so much of the building as being all one, then these things are fixed to the soil, and so much of the soil as is necessary to keep them where they are is occupied by them. Therefore in that way they occupy a part of the soil. It is not like a right to hang things on something which is fixed on the soil, but it is a right given by the owner or occupier of each house to affix these things to it in order that they may be supported by the house and by the ground on which the house stands. If that be so, then they are things which may be the subject-matter of occupation of the soil by the person who is in occupation of them. Now who in the present case is in occupation of these things? These things, by which I mean the whole apparatus, are the exclusive property of the telephone company, and are used as between the company and the occupiers of the houses who have given the right to affix them solely and exclusively for the benefit of the company.

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(1) 11 Ex. 181.

(2) 9 Q. B. D. 585; 10 Q. B. D. 327.

(3) 2 Q. B. D. 581.

(4) 32 L. J. (M.C.) 245.

(5) Law Rep. 10 C. P. 504; 1 C. P. D. 54; 2 App. Cas. 262.

Under those circumstances it seems to me that the company are in the exclusive occupation of them, and are therefore in the exclusive occupation of something which occupies a part of the land, and so are in the occupation of the land and are rateable.

That brings the case to what was present to the mind of Mellish, L.J., in *Cory* v. *Bristow* (1), where he says (at p. 57): "The only remaining question, therefore, is whether the conservators or the plaintiffs are in the occupation of these moorings. Now, it seems to me that the Court of Common Pleas have not sufficiently taken into consideration the fact that these mooring stones all along belonged to the plaintiffs. There is a great distinction in that respect between this case and cases such as those in which the question arose, as between a person who had had granted to him some right of user of the land, and the grantor who had reserved some right over it to himself, which of the two was the occupier for rating purposes, as, for instance, the cases where the question was whether a party was in the position of a lodger merely, the landlord remaining the occupier, or in that of a tenant. Very nice distinctions have arisen in such cases, but there both parties have more or less a co-property in the house, or other real property in question. It is necessary in such a case to consider what degree of right each party may have. But here the conservators did not obtain any property in the mooring stones, anchors, or chains, and it was never intended that they should be applied in any way for the benefit of the conservators." So here it never was intended that any property whatever, or any right or power over any of these fixed things should ever belong to the occupiers of the houses, but that the whole profitable user of these things, and the exclusive right of dealing with them, subject to regulations, should belong to the company. These things belonged exclusively to the company, and were to be used solely for their benefit, and not in the least for the benefit of the occupiers of the houses. Under those circumstances it seems to me that this case is therefore like the case of the telegraph wires fixed to posts which are fixed in the ground. The reason why it has been held that they are in the occupation of the persons to whom they belong, is because the property in them is solely the property of those persons, and that they use them solely on their own account, and that the persons who have given the right to fix them to the soil have no interest in them, or power over them, except the power of giving notice to have them removed or taken away. I think, therefore, this company was rateable, and that this appeal must be dismissed.

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(1) 1 C. P. D. 54.

LINDLEY, L.J. I am of the same opinion. The distinction between an easement of support and the occupation of that which affords support is often very fine. I think the telephone company occupy land in the same sense as many other persons who have been grantees of easements and have been held rateable. I cannot help coming to the conclusion that though they do not occupy land in the ordinary sense, they do occupy land by their wires and supports just as much as if the wires were carried by posts, as in the case of *Electric Telegraph Company* v. *Overseers of Salford.* (1)

It appears to me they are on the rateable side of the line which has been drawn, and I do not feel pressed, I confess, with the case of *Smith* v. *Lambeth Assessment Committee* (2), because there it was attempted to rate two people for the same things. There the railway company were rated for the land for which it was also sought to rate Smith, but here nobody is rated for this occupation. I cannot find any distinction in principle between the present case and *Electric Telegraph Company* v. *Overseers of Salford* (1) and *Cory* v. *Bristow.* (3)

Appeal dismissed.

Solicitors for appellants: *Pritchard, Englefield, & Co., for Grundy, Kershaw, & Co., Manchester.*

Solicitors for respondents: *Johnson & Weatherall, for A. Lings, Manchester.*

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(1) 11 Ex. 181.

(2) 9 Q. B. D. 585; 10 Q. B. D. 327.

(3) Law Rep. 10 C. P. 504; 1 C. P. D. 54; 2 App. Cas. 262.

W. P.

THE QUEEN *v.* DUDLEY AND STEPHENS.

1884
Dec. 9.

Criminal Law—Murder—Killing and eating Flesh of Human Being under Pressure of Hunger—" Necessity "—Special Verdict—Certiorari—Offence on High Seas—Jurisdiction of High Court.

A man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder; although at the time of the act he is in such circumstances that he believes and has reasonable ground for believing that it affords the only chance of preserving his life.

At the trial of an indictment for murder it appeared, upon a special verdict, that the prisoners D. and S., seamen, and the deceased, a boy between seventeen and eighteen, were cast away in a storm on the high seas, and compelled to put into an open boat; that the boat was drifting on the ocean, and was probably more than 1000 miles from land; that on the eighteenth day, when they had been seven days without food and five without water, D. proposed to S. that lots should be cast who should be put to death to save the rest, and that they afterwards thought it would be better to kill the boy that their lives should be saved; that on the twentieth day D., with the assent of S., killed the boy, and both D. and S. fed on his flesh for four days; that at the time of the act there was no sail in sight nor any reasonable prospect of relief; that under these circumstances there appeared to the prisoners every probability that unless they then or very soon fed upon the boy, or one of themselves, they would die of starvation:—

Held, that upon these facts, there was no proof of any such necessity as could justify the prisoners in killing the boy, and that they were guilty of murder.

INDICTMENT for the murder of Richard Parker on the high seas within the jurisdiction of the Admiralty.

At the trial before Huddleston, B., at the Devon and Cornwall Winter Assizes, November 7, 1884, the jury, at the suggestion of the learned judge, found the facts of the case in a special verdict which stated " that on July 5, 1884, the prisoners, Thomas Dudley and Edward Stephens, with one Brooks, all able-bodied English seamen, and the deceased also an English boy, between seventeen and eighteen years of age, the crew of an English yacht, a registered English vessel, were cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat belonging to the said yacht. That in this boat they had no supply of water and no supply of food, except two 1lb. tins of turnips, and for three days they had nothing else to subsist upon. That on the fourth day they caught a small turtle, upon which they subsisted for a few days, and this was the only food they had up to the twentieth day when the act now in question was committed. That on the twelfth day the remains of the turtle were entirely consumed, and for the next eight days they had nothing to eat. That they had no fresh water, except such rain as they from time to time caught in their oilskin capes. That the boat was drifting on the ocean, and was probably more than 1000 miles away from land. That on the eighteenth day, when they had been seven days without food and five without water, the prisoners spoke to Brooks as to what should be done if no succour came, and suggested that some one should be sacrificed to save the rest, but Brooks dissented, and the boy, to whom they were understood to refer, was not consulted. That on the 24th of July, the day before the act now in question, the prisoner Dudley proposed to Stephens and Brooks that lots should be cast who should be put to death to save the rest, but Brooks refused to consent, and it was not put to the boy, and in point of fact there was no drawing of lots. That on that day the prisoners spoke of their having families, and suggested it would be better to kill the boy that their lives should be saved, and Dudley proposed that if there was no vessel in sight by the morrow morning the boy should be killed. That next day, the 25th of July, no vessel appearing, Dudley told Brooks that he had better go and have a sleep, and made signs to Stephens and Brooks that the boy had better be killed. The prisoner Stephens agreed to the act, but Brooks dissented from it. That the boy was then lying at the bottom of the boat quite helpless, and extremely weakened by famine and by drinking sea water, and unable to make any resistance, nor did he ever assent to his being killed. The prisoner Dudley offered a prayer asking forgiveness for them all if either of them should be tempted to commit a rash act, and that their souls might be saved. That Dudley, with the assent of Stephens, went to the boy, and telling him that his time was come, put a knife into his throat and killed him then and there; that the three men fed upon the body and blood of the boy for four days; that on the fourth day after the act had been committed the boat was picked up by a passing vessel, and the prisoners were rescued, still alive, but in the lowest state of prostration. That they were carried to the port of Falmouth, and committed for trial at Exeter. That if the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition, was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under these circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation. That there was no appreciable chance of saving life except by killing some one for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men." But whether upon the whole matter by the jurors found the killing of Richard Parker by Dudley and Stephens be felony and murder the jurors are ignorant, and pray the advice of the Court thereupon, and if upon the whole matter the Court shall be of opinion that the killing of Richard Parker be felony and murder, then the jurors say that Dudley and Stephens were each guilty of felony and murder as alleged in the indictment."

The learned judge then adjourned the assizes until the 25th of November at the Royal Courts of Justice. On the application of the Crown they were again adjourned to the 4th of December, and the case ordered to be argued before a Court consisting of five judges.

Dec. 4. *Sir H. James, A.G.* (*A. Charles, Q.C.*, *C. Mathews*, and *Danckwerts*, with him), appeared for the Crown.

The record having been read,

A. Collins, Q.C. (*H. Clark*, and *Pyke*, with him), for the prisoners, objected, first, that the statement in the verdict that the yacht was a registered British vessel, and that the boat in which the prisoners were belonged to the yacht, was not part of any finding by the jury; secondly, that the formal conclusion of the verdict, "whether upon the whole matter the prisoners were and are guilty of murder, the jury are ignorant," &c., was also no part of the finding of the jury, as they simply found the facts relating to the death of Parker, and nothing else was referred to them;

thirdly, that the record could not be filed, for it had been brought into the court by order only, and not by certiorari.

Sir H. James, A.G., for the Crown. As to the first point, the Crown are willing that the statement that the yacht was a registered British vessel, and that the boat belonged to the yacht, should be struck out of the record. With regard to the conclusion of the verdict it is according to the form of special verdicts in the Reports: *Rex* v. *Pedley* (1); *Rex* v. *Oneby* (2); *Mackally's Case* (3); *Hazel's Case.* (4) As for the certiorari there was no necessity for it, for the Court of Assize is now part of this Court.

[THE COURT intimated that the points taken on behalf of the prisoners were untenable.]

With regard to the substantial question in the case—whether the prisoners in killing Parker were guilty of murder—the law is that where a private person acting upon his own judgment takes the life of a fellow creature, his act can only be justified on the ground of self-defence—self-defence against the acts of the person whose life is taken. This principle has been extended to include the case of a man killing another to prevent him from committing some great crime upon a third person. But the principle has no application to this case, for the prisoners were not protecting themselves against any act of Parker. If he had had food in his possession and they had taken it from him, they would have been guilty of theft; and if they killed him to obtain this food, they would have been guilty of murder. The case cited by Puffendorf in his Law of Nature and Nations, which was referred to at the trial, has been found, upon examination in the British Museum, in the work of Nicolaus Tulpius, a Dutch writer, and it is clear that it was not a judicial decision. (5)

[He was stopped.]

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(1) Leach, C. C. 242.

(2) 2 Ld. Raym. 1485.

(3) 9 Co. 65 b.

(4) Leach, C. C. 368.

(5) HUDDLESTON, B., stated that the full facts of the case had been discovered by Sir Sherston Baker, a member of the Bar, and communicated to him as follows:—

A Dutch writer, Nicolaus Tulpius, the author of a Latin work, Observationum Medicarum, written at Amsterdam in 1641, states that the following facts were given him by eye-witnesses. Seven Englishmen had prepared themselves in the Island of St. Christopher (one of the Caribbean Islands) for a cruise in a boat for a period of one night only, but a storm drove them so far out to sea that they could not get

A. Collins, Q.C., for the prisoners. The facts found on the special verdict shew that the prisoners were not guilty of murder, at the time when they killed Parker, but killed him under the pressure of necessity. Necessity will excuse an act which would otherwise be a crime. Stephen, Digest of Criminal Law, art. 32, Necessity. The law as to compulsion by necessity is further explained in Stephen's History of the Criminal Law, vol. ii., p. 108, and an opinion is expressed that in the case often put by casuists, of two drowning men on a plank large enough to support one only, and one thrusting the other off, the survivor could not be subjected to legal punishment. In the American case of *The United States* v. *Holmes* (1), the proposition that a passenger on board a vessel may be thrown overboard to save the others is sanctioned. The law as to inevitable necessity is fully considered

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back to port before seventeen days. One of them proposed that they should cast lots to settle on whose body they should assuage their ravenous hunger. Lots were cast, and the lot fell on him who had proposed it. None wished to perform the office of butcher; and lots were again cast to provide one. The body was afterwards eaten. At length the boat was cast on the shore of the Isle of St. Martin, one of the same group, where the six survivors were treated with kindness by the Dutch, and sent home to St. Christopher.

The principal passages in the original are as follows:—

"... Horribilis illa tragœdia quam non ita pridem conspexit India Occidentalis in septem Britannis; quibus necessitas famem fecit undecim dierum. Velut nobis sincere relatum, a testibus oculatis qui hæc ipsa ventorum ludibria et humaniter navibus suis excepêre, et officiosè ad suos reduxêre, septem Britanni accinxerant se in insulâ Christophorianâ unius solummodo noctis itineri, ultrà quam etiam non extenderant commeatum. At interveniens tempestas abripuit imparatos longius in mare quam ut potuerint reverti ad portum destinatum ante diem septimum decimum. . . . Cujus intracti erroris, nullum finem promittente spatioso mari, adigebantur tandem (O durum necessitatis telum!) ancipiti sorti committere, cujus carne urgentem famem, et quo sanguine compescerent inexplebilem sitim. Sed jacta alea (quis eventum hunc non miretur!) destinabit primæ cædi primum hujus lanienæ auctorem. . . . Quâ oratione ut non parum lenivit horrendi facinoris atrocitatem, sic erexit utique usque eò flaccidos ipsorum animos: ut tandem reperiretur aliquis, sorte tamen priusductus qui petierit animose perorantis jugulem, et intulerit vim volenti. Cujus cadaveris expetiit quilibet illorum tam præproperè frustum, ut vix potuerit tam festinanter dividi.

"... At tandem misertus hujus erroris Deus deduxit ipsorum naviculam ad insulam Martiniam in quâ à præsidio Belgico et humaniter excepti, et benignè ad suos reducti fuêre. Sed vix attigerant terram quin accusarentur protinus a prætore homicidii. Sed diluente crimen inevitabili necessitate, dedit ipsis brevì veniam ipsorum judex."

(1) 1 Wallace, Jun. 25.

in Russell on Crimes, vol. i. p. 847, and there are passages relating to it in Bracton, vol. ii. p. 277; Hale's Pleas of the Crown, p. 54 and c. 40; East's Pleas of the Crown, p. 221, citing Dalton, c. 98, "Homicide of Necessity," and several cases, amongst others *McGrowther's Case* (1); *Stratton's Case* (2). Lord Bacon, Bac. Max., Reg. 5, gives the instance of two shipwrecked persons clinging to the same plank and one of them thrusting the other from it, finding that it will not support both, and says that this homicide is excusable through unavoidable necessity and upon the great universal principle of self-preservation, which prompts every man to save his own life in preference to that of another, where one of them must inevitably perish. It is true that Hale's Pleas of the Crown, p. 54, states distinctly that hunger is no excuse for theft, but that is on the ground that there can be no such extreme necessity in this country. In the present case the prisoners were in circumstances where no assistance could be given. The essence of the crime of murder is intention, and here the intention of the prisoners was only to preserve their lives.

Lastly, it is not shewn that there was jurisdiction to try the prisoners in England. They were part of the crew of an English yacht, but for anything that appears on the special verdict the boat may have been a foreign boat, so that they were not within the jurisdiction of the Admiralty: *Reg.* v. *Keyn.* (3) The indictment is not upon the Act 17 & 18 Vict. c. 104, for an offence committed by seamen employed or recently employed in a British ship. The special verdict cannot be amended in a capital case by stating the real facts.

Sir H. James, A.G., for the Crown.

[LORD COLERIDGE, C.J. The Court are of opinion that the conviction must be affirmed. What course do you invite us to take?]

To pronounce judgment and pass sentence. This was the practice even when, as formerly, the record was removed by certiorari: *Rex* v. *Royce* (4); *Rex* v. *Athos* (5); *Rex* v. *Cock.* (6)

THE COURT intimated that judgment would be given on December 9th.

(1) 18 How. St. Tr. 391.
(2) 21 How. St. Tr. 1223.
(3) 2 Ex. D. 63.
(4) 4 Burr. 2073.
(5) 8 Mod. 136.
(6) 4 M. & S. 71.

Dec. 9. The judgment of the Court (Lord Coleridge, C.J., Grove and Denman, JJ., Pollock and Huddleston, BB.) was delivered by

Lord Coleridge, C.J. The two prisoners, Thomas Dudley and Edwin Stephens, were indicted for the murder of Richard Parker on the high seas on the 25th of July in the present year. They were tried before my Brother Huddleston at Exeter on the 6th of November, and, under the direction of my learned Brother, the jury returned a special verdict, the legal effect of which has been argued before us, and on which we are now to pronounce judgment.

The special verdict as, after certain objections by Mr. Collins to which the Attorney General yielded, it is finally settled before us is as follows. [His Lordship read the special verdict as above set out.] From these facts, stated with the cold precision of a ✓ special verdict, it appears sufficiently that the prisoners were subject to terrible temptation, to sufferings which might break down the bodily power of the strongest man, and try the conscience of the best. Other details yet more harrowing, facts still more loathsome and appalling, were presented to the jury, and are to be found recorded in my learned Brother's notes. But nevertheless this is clear, that the prisoners put to death a weak and unoffending boy upon the chance of preserving their own lives by feeding upon his flesh and blood after he was killed, and with the certainty of depriving *him* of any possible chance of survival. The verdict finds in terms that "if the men had not fed upon the body of the boy they would *probably* not have survived," and that "the boy being in a much weaker condition was *likely* to have died before them." They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act. It is found by the verdict that the boy was incapable of resistance, and, in fact, made none; and it is not even suggested that his death was due to any violence on his part attempted against, or even so much as feared by, those who killed him. Under these circumstances the jury say that they are ignorant whether those who killed him were guilty of murder, and have referred it to this Court to determine what is the legal consequence which follows from the facts which they have found.

Certain objections on points of form were taken by Mr. Collins before he came to argue the main point in the case. First it was contended that the conclusion of the special verdict as entered on the record, to the effect that the jury find their verdict in accordance, either way, with the judgment of the Court, was not put to them by my learned Brother, and that its forming part of the verdict on the record invalidated the whole verdict. But the answer is twofold—(1) that it is really what the jury meant, and that it is but the clothing in legal phraseology of that which is already contained by necessary implication in their unquestioned finding, and (2) that it is a matter of the purest form, and that it appears from the precedents with which we have been furnished from the Crown Office, that this has been the form of special verdicts in Crown cases for upwards of a century at least.

Next it was objected that the record should have been brought into this Court by certiorari, and that in this case no writ of certiorari had issued. The fact is so; but the objection is groundless. Before the passing of the Judicature Act, 1873 (36 & 37 Vict. c. 66), as the courts of Oyer and Terminer and Gaol delivery were not parts of the Court of Queen's Bench, it was necessary that the Queen's Bench should issue its writ to bring before it a record not of its own, but of another Court. But by the 16th section of the Judicature Act, 1873, the courts of Oyer and Terminer and Gaol delivery are now made part of the High Court, and their jurisdiction is vested in it. An order of the Court has been made to bring the record from one part of the court into this chamber, which is another part of the same court; the record is here in obedience to that order; and we are all of opinion that the objection fails.

It was further objected that, according to the decision of the majority of the judges in the *Franconia Case* (1), there was no jurisdiction in the Court at Exeter to try these prisoners. But (1) in that case the prisoner was a German, who had committed the alleged offence as captain of a German ship; these prisoners were English seamen, the crew of an English yacht, cast away in

(1) 2 Ex. D. 63.

a storm on the high seas, and escaping from her in an open boat; (2) the opinion of the minority in the *Franconia Case* (1) has been since not only enacted but declared by Parliament to have been always the law; and (3) 17 & 18 Vict. c. 104, s. 267, is absolutely fatal to this objection. By that section it is enacted as follows:—"All offences against property or person committed in or at any place either ashore or afloat, out of her Majesty's dominions by any master seaman or apprentice who at the time when the offence is committed is or within three months previously has been employed in any British ship, shall be deemed to be offences of the same nature respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same places as if such offences had been committed within the jurisdiction of the Admiralty of England." We are all therefore of opinion that this objection likewise must be overruled.

There remains to be considered the real question in the case—whether killing under the circumstances set forth in the verdict be or be not murder. The contention that it could be anything else was, to the minds of us all, both new and strange, and we stopped the Attorney General in his negative argument in order that we might hear what could be said in support of a proposition which appeared to us to be at once dangerous, immoral, and opposed to all legal principle and analogy. All, no doubt, that can be said has been urged before us, and we are now to consider and determine what it amounts to. First it is said that it follows from various definitions of murder in books of authority, which definitions imply, if they do not state, the doctrine, that in order to save your own life you may lawfully take away the life of another, when that other is neither attempting nor threatening yours, nor is guilty of any illegal act whatever towards you or any one else. But if these definitions be looked at they will not be found to sustain this contention. The earliest in point of date is the passage cited to us from Bracton, who lived in the reign of Henry III. It was at one time the fashion to discredit Bracton, as Mr. Reeve tells us, because he was supposed to mingle too much of the canonist and civilian with the common lawyer. There is now no such feeling, but the passage upon homicide, on which reliance is placed,

(1) 2 Ex. D. 63.

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Lord Coleridge, C.J.

is a remarkable example of the kind of writing which may explain it. Sin and crime are spoken of as apparently equally illegal, and the crime of murder, it is expressly declared, may be committed "linguâ vel facto"; so that a man, like Hero "done to death by slanderous tongues," would, it seems, in the opinion of Bracton, be a person in respect of whom might be grounded a legal indictment for murder. But in the very passage as to necessity, on which reliance has been placed, it is clear that Bracton is speaking of necessity in the ordinary sense—the repelling by violence, violence justified so far as it was necessary for the object, any illegal violence used towards oneself. If, says Bracton, the necessity be "evitabilis, et evadere posset absque occisione, tunc erit reus homicidii"—words which shew clearly that he is thinking of physical danger from which *escape* may be possible, and that the "inevitabilis necessitas" of which he speaks as justifying homicide is a necessity of the same nature.

It is, if possible, yet clearer that the doctrine contended for receives no support from the great authority of Lord Hale. It is plain that in his view the necessity which justified homicide is that only which has always been and is now considered a justification. "In all these cases of homicide by necessity," says he, "as in pursuit of a felon, in killing him that assaults to rob, or comes to burn or break a house, or the like, which are in themselves no felony" (1 Hale's Pleas of the Crown, p. 491). Again, he says that "the necessity which justifies homicide is of two kinds: (1) the necessity which is of a private nature; (2) the necessity which relates to the public justice and safety. The former is that necessity which obligeth a man to his own defence and safeguard, and this takes in these inquiries:—(1.) What may be done for the safeguard of a man's own life;" and then follow three other heads not necessary to pursue. Then Lord Hale proceeds:—"As touching the first of these—viz., homicide in defence of a man's own life, which is usually styled se defendendo." It is not possible to use words more clear to shew that Lord Hale regarded the private necessity which justified, and alone justified, the taking the life of another for the safeguard of one's own to be what is commonly called "self-defence." (Hale's Pleas of the Crown, i. 478.)

But if this could be even doubtful upon Lord Hale's words, Lord

Hale himself has made it clear. For in the chapter in which he deals with the exemption created by compulsion or necessity he thus expresses himself:— "If a man be desperately assaulted and in peril of death, and cannot otherwise escape unless, to satisfy his assailant's fury, he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact, for he ought rather to die himself than kill an innocent; but if he cannot otherwise save his own life the law permits him in his own defence to kill the assailant, for by the violence of the assault, and the offence committed upon him by the assailant himself, the law of nature, and necessity, hath made him his own protector cum debito moderamine inculpatæ tutelæ." (Hale's Pleas of the Crown, vol. i. 51.)

But, further still, Lord Hale in the following chapter deals with the position asserted by the casuists, and sanctioned, as he says, by Grotius and Puffendorf, that in a case of extreme necessity, either of hunger or clothing; "theft is no theft, or at least not punishable as theft, as some even of our own lawyers have asserted the same." "But," says Lord Hale, "I take it that here in England, that rule, at least by the laws of England, is false; and therefore, if a person, being under necessity for want of victuals or clothes, shall upon that account clandestinely and animo furandi steal another man's goods, it is felony, and a crime by the laws of England punishable with death." (Hale, Pleas of the Crown, i. 54.) If, therefore, Lord Hale is clear—as he is—that extreme necessity of hunger does not justify larceny, what would he have said to the doctrine that it justified murder?

It is satisfactory to find that another great authority, second, probably, only to Lord Hale, speaks with the same unhesitating clearness on this matter. Sir Michael Foster, in the 3rd chapter of his Discourse on Homicide, deals with the subject of "homicide founded in necessity"; and the whole chapter implies, and is insensible unless it does imply, that in the view of Sir Michael Foster "necessity and self-defence" (which he defines as "opposing force to force even to the death") are convertible terms. There is no hint, no trace, of the doctrine now contended for; the whole reasoning of the chapter is entirely inconsistent with it.

In East's Pleas of the Crown (i. 271) the whole chapter on homicide by necessity is taken up with an elaborate discussion of the limits within which necessity in Sir Michael Foster's sense (given above) of self-defence is a justification of or excuse for homicide. There is a short section at the end very generally and very doubtfully expressed, in which the only instance discussed is the well-known one of two shipwrecked men on a plank able to sustain only one of them, and the conclusion is left by Sir Edward East entirely undetermined.

What is true of Sir Edward East is true also of Mr. Serjeant Hawkins. The whole of his chapter on justifiable homicide assumes that the only justifiable homicide of a private nature is the defence against force of a man's person, house, or goods. In the 26th section we find again the case of the two shipwrecked men and the single plank, with the significant expression from a careful writer, "*It is said* to be justifiable." So, too, Dalton c. 150, clearly considers necessity and self-defence in Sir Michael Foster's sense of that expression, to be convertible terms, though he prints without comment Lord Bacon's instance of the two men on one plank as a quotation from Lord Bacon, adding nothing whatever to it of his own. And there is a remarkable passage at page 339, in which he says that even in the case of a murderous assault upon a man, yet before he may take the life of the man who assaults him even in self-defence, "cuncta prius tentanda."

The passage in Staundforde, on which almost the whole of the dicta we have been considering are built, when it comes to be examined, does not warrant the conclusion which has been derived from it. The necessity to justify homicide must be, he says, inevitable, and the example which he gives to illustrate his meaning is the very same which has just been cited from Dalton, shewing that the necessity he was speaking of was a physical necessity, and the self-defence a defence against physical violence. Russell merely repeats the language of the old text-books, and adds no new authority, nor any fresh considerations.

Is there, then, any authority for the proposition which has been presented to us? Decided cases there are none. The case of the seven English sailors referred to by the commentator on Grotius and by Puffendorf has been discovered by a gentleman of the Bar, who communicated with my Brother Huddleston, to convey the authority (if it conveys so much) of a single judge of the island of St. Kitts, when that island was possessed partly by France and partly by this country, somewhere about the year 1641. It is mentioned in a medical treatise published at Amsterdam, and is altogether, as authority in an English court, as unsatisfactory as possible. The American case cited by my Brother Stephen in his Digest, from Wharton on Homicide, in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly, as my Brother Stephen says, be an authority satisfactory to a court in this country. The observations of Lord Mansfield in the case of *Rex* v. *Stratton and Others* (1), striking and excellent as they are, were delivered in a political trial, where the question was whether a political necessity had arisen for deposing a Governor of Madras. But they have little application to the case before us, which must be decided on very different considerations.

The one real authority of former time is Lord Bacon, who, in his commentary on the maxim, "necessitas inducit privilegium quoad jura privata," lays down the law as follows:—"Necessity carrieth a privilege in itself. Necessity is of three sorts—necessity of conservation of life, necessity of obedience, and necessity of the act of God or of a stranger. First of conservation of life; if a man steal viands to satisfy his present hunger, this is no felony nor larceny. So if divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned, this is neither se defendendo nor by misadventure, but justifiable." On this it is to be observed that Lord Bacon's proposition that stealing to satisfy hunger is no larceny is hardly supported by Staundforde, whom he cites for it, and is expressly contradicted by Lord Hale in the passage already cited. And for the proposition as to the plank or boat, it is said to be derived from the canonists. At any rate he cites no authority for it, and it must stand upon his own. Lord Bacon was great even as a lawyer; but it is permissible to much smaller men, relying upon principle and on the authority of others, the

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(1) 21 How. St. Tr. at p. 1223.

Lord Coleridge, C.J.

equals and even the superiors of Lord Bacon as lawyers, to question the soundness of his dictum. There are many conceivable states of things in which it might possibly be true, but if Lord Bacon meant to lay down the broad proposition that a man may save his life by killing, if necessary, an innocent and unoffending neighbour, it certainly is not law at the present day.

There remains the authority of my Brother Stephen, who, both in his Digest and in his History of the Criminal Law, uses language perhaps wide enough to cover this case. The language is somewhat vague in both places, but it does not in either place cover this case of necessity, and we have the best authority for saying that it was not meant to cover it. If it had been necessary, we must with true deference have differed from him, but it is satisfactory to know that we have, probably at least, arrived at no conclusion in which if he had been a member of the Court he would have been unable to agree. Neither are we in conflict with any opinion expressed upon the subject by the learned persons who formed the commission for preparing the Criminal Code. They say on this subject:—

"We are certainly not prepared to suggest that necessity should in every case be a justification. We are equally unprepared to suggest that necessity should in no case be a defence; we judge it better to leave such questions to be dealt with when, if ever, they arise in practice by applying the principles of law to the circumstances of the particular case."

It would have been satisfactory to us if these eminent persons could have told us whether the received definitions of legal necessity were in their judgment correct and exhaustive, and if not, in what way they should be amended, but as it is we have, as they say, "to apply the principles of law to the circumstances of this particular case."

Now, except for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances, an absolute, unqualified, and paramount duty, we exclude from our consideration all the incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their Sovereign and in the defence of their country. Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called "necessity." But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the *Birkenhead;* these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life. "Necesse est ut eam, non ut vivam," is a saying of a Roman officer quoted by Lord Bacon himself with high eulogy in the very chapter on necessity to which so much reference has been made. It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors, from Horace, from Juvenal, from Cicero, from Euripides, passage after passage, in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics; it is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow. It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No"—

> "So spake the Fiend, and with necessity,
> The tyrant's plea, excused his devilish deeds."

It is not suggested that in this particular case the deeds were "devilish," but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it.

It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder, that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are upon this special verdict guilty of murder. (1)

THE COURT then proceeded to pass sentence of death upon the prisoners. (2)

Solicitors for the Crown: *The Solicitors for the Treasury.*

Solicitors for the prisoners: *Irvine & Hodges.*

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(1) My brother Grove has furnished me with the following suggestion, too late to be embodied in the judgment but well worth preserving: "If the two accused men were justified in killing Parker, then if not rescued in time, two of the three survivors would be justified in killing the third, and of the two who remained the stronger would be justified in killing the weaker, so that three men might be justifiably killed to give the fourth a chance of surviving."—C.

(2) This sentence was afterwards commuted by the Crown to six months' imprisonment.

A. P. S.

THE GUARDIANS OF HOLBORN, MIDDLESEX, APPELLANTS; THE GUARDIANS OF CHERTSEY, SURREY, RESPONDENTS.

1884
Dec. 15.

Poor Law—Settlement by Residence—Divided Parishes Act (39 & 40 *Vict. c.* 61), s. 34—*Children under Seven.*

Upon appeal from an order of removal it appeared that seven years before the order the paupers, children then under seven years of age, were, on the death of their mother, placed by their father in the care of K., who resided at Chertsey, Surrey, and lived with him from that time continuously until they became chargeable. There was no evidence as to their residence before they went to Chertsey.

The children were visited by their father on three occasions only after they went to Chertsey, and then only for a few hours at a time, but he made a weekly payment for their maintenance, which was continued till his death, six years afterwards. The children never visited their father:—

Held, that the father in sending the children to Chertsey must be taken to have intended that their absence should be permanent; that there was no evidence of any intention on his part to take them back to live with him, and that notwithstanding their infancy they acquired a settlement by residence in Chertsey, under 39 & 40 Vict. c. 61, s. 34.

CASE stated under 12 & 13 Vict. c. 45, s. 11, upon appeal against an order of justices of the 20th of February, 1884, adjudging that Amy Kelly and Wallace Kelly were settled within the appellant union.

On the 20th of October, 1883, Amy Kelly, aged eleven years, and Wallace Kelly, aged nine years, became chargeable to the respondent union.

On the 20th of February, 1884, an order was made by justices of Surrey adjudging Amy and Wallace Kelly to be legally settled in that part of the parish of St. Andrew, Holborn, which is comprised in the appellant union, and this order is appealed against. The paupers Amy and Wallace Kelly are the lawful children of T. W. Kelly and Sarah Ann his wife.

The parents of the paupers are both deceased. The mother, Sarah Ann Kelly, died in childbirth, in February, 1877, and the father, T. W. Kelly, committed suicide, it is believed, in February, 1883.

The paupers, in February, 1877, on the death of their mother, were placed by their father in the care of Samuel and Ann King, who were then and now are residing at Addlestone, in the parish of Chertsey, in the respondent union, and the paupers still remain in the care of S. and A. King.

From February, 1877, up to February, 1883, the father's visits to the children were as follows: the last time, on Boxing Day, 1880, and twice previously. He came down on each of these occasions by the mid-day train, and left on each evening early. The sum agreed upon for the children's maintenance (10*s.* per week) was remitted through the father's employer, who paid absolutely out of his own pocket the said sum of 10*s.* per week from February, 1877, to May, 1879. The father then paid half that sum and the father's employer the other half, and the father's half was stopped out of his wages by his employer. In February, 1883, after Kelly, the father, disappeared, the employer kept up the 10*s.* per week out of his own pocket until the children became chargeable, and has paid six shillings per week up to the end of March, 1884. The sum agreed upon for the children's clothing (9*s.* per quarter) was paid or remitted to the foster parents regularly by the father from February, 1877, until Christmas, 1880. The paupers' father resided from March, 1877, until May, 1881, in the parish of St. Andrew, Holborn, in the appellant union, under such circumstances as to gain a settlement in the parish by virtue of 39 & 40 Vict. c. 61, s. 34.

The appellants contend that the paupers have resided from February, 1877, and still continue to reside in Chertsey, and thereby have acquired a settlement in their own right in Chertsey in the respondent union, as their actual bodily residence for the period and under the circumstances above mentioned, comes within and satisfies the meaning of the residence prescribed by s. 34 of 39 & 40 Vict. c. 61.

The respondents, on the other hand, contend that the paupers, under the above circumstances, were constructively resident from February, 1877, to the commencement of the year 1883, with their father, T.W. Kelly. That they were, therefore, unable to acquire any settlement in their own right in the respondent union under 39 & 40 Vict. c. 61, s. 34, or otherwise during such period, and are settled in the appellant union by reason of their father's residence therein from March, 1877, until May, 1881, as aforesaid. The question for the opinion of the Court is, whether the paupers were, at the time of the making of the order of removal, settled in Chertsey in the respondent union.

A. Charles, Q.C. (*Poland* with him), for the appellants. The pauper children acquired a settlement by residence in Surrey within 39 & 40 Vict. c. 61, s. 34. (1) Their actual physical residence was in Surrey, and their infancy did not prevent them from acquiring a settlement by residence any more than it prevents a lad under sixteen from acquiring a settlement by apprenticeship. It will be said that they took their father's settlement, which was in the appellant union. But a child can acquire a settlement by residence apart from its parents. In *Wolstanton Union* v. *Northwich Union* (2), a child of twelve having resided in a parish for the term prescribed by s. 34, was held by Grove, J., to have acquired a settlement by residence, though its settlement by birth and parentage was in another union, and the learned judge expressed his opinion that there was nothing in s. 35 to prevent a child from acquiring a settlement under s. 34.

R. Cunningham Glen, for the respondents. *Wolstanton Union* v. *Northwich Union* (2) is no authority that unemancipated children can gain a settlement under s. 34. It merely decides that the Act contains no provision on the subject, leaving the previous law untouched. The case there (paragraph 3) found that the pauper had resided so as to gain a settlement, which prevented any question as to emancipation from being raised. An unemancipated child like the children here cannot gain a settlement. A child can only be emancipated by contracting some relation inconsistent with its being part of its father's family; till then it takes its father's settlement: *Rex* v. *Witton cum Twambrookes.* (1) Here until the father's death the children were under his control; he was entitled to their custody, and could have enforced his right by habeas corpus. In *Rex* v. *Offchurch* (2) it was laid down that the settlement of a child of five years old leaving its father's family and living with different relations till ten years old, followed that of the father, if the child had not gained any settlement in its own right. This doctrine is affirmed by Cockburn, C.J., in *Reg.* v. *Leeds Union* (3), who says: "It is true that where a child is under the authority and control of its parent it may, even when placed at a school in a different parish, be said to constructively reside with the parent." And it is also affirmed in *Keynsham Union* v. *Bedminster Union.* (4) In *Reg.* v. *St. Olave's* (5) it was applied so as to prevent a daughter nineteen years old from becoming irremoveable by two years' residence.

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(1) Sect. 34. "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise."

Sect. 35. "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under sixteen, which child shall take the settlement of its father or its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

(2) 46 L. T. (N.S.) 523.

Poland, in reply. There is nothing to prevent children of the paupers' age from acquiring a settlement under s. 34 by residence apart from their parents. The nature of the residence must be considered in each particular case. The residence of children at a school is not like that here. *Reg.* v. *Leeds Union* (3) is in point. There as here the parent placed the child in the custody of others, and it gained a settlement. The father of these children intended to live in one parish and that the children should live in another, and he made a permanent arrangement to carry his plan into effect. It could not be said that children were residing with a father who was travelling about with no fixed home. The case is not distinguishable from that where a child is sent by its father into another parish for the purpose of learning a trade.

Cur. adv. vult.

Dec. 15. The judgment of the Court (Hawkins, J., and Smith, J.) was delivered by

HAWKINS, J. The question submitted for our opinion is, whether the pauper children Amy and Wallace Kelly, who in

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(1) 3 T. R. 355.
(2) 3 T. R. 114.
(3) 4 Q. B. D. 323.
(4) 3 Q. B. D. 344.
(5) Law Rep. 9 Q. B. 38.

October, 1883, became chargeable to the Union of Chertsey, were, on the 20th of February, 1884, when an order was made adjudging them to be settled in the parish of St. Andrew, Holborn, legally so settled. The paupers' father was admittedly legally settled in the said parish of St. Andrew by residence there from March 1877, till May, 1881. Where he resided before March 1877, or after May 1881, is not stated. His wife, the mother of the paupers, died in February 1877. He died in February, 1883.

In February, 1877, on the death of their mother, the paupers, being then respectively five and three years of age, were placed by their father in the care of Samuel and Ann King, who lived at Chertsey, in the county of Surrey, and in such care they lived in that parish from that time continuously until the said order was made. It does not appear that the paupers were ever in the parish of St. Andrew, nor is it shewn from whence they were sent to the Kings, nor where they had resided before that event. On three occasions only after the children went to Chertsey did their father visit them, and then only for a few hours at a time, but he agreed to pay 10*s.* a week for their maintenance; and this sum was paid either by the father or his employer till he died, and afterwards by his employer out of his own pocket. From February 1877, to Christmas 1880, the father also paid to the Kings a stipulated sum for the children's clothing. The children never visited their father, nor were they ever out of Chertsey after they commenced to live with the Kings.

The appellants contended before us that the paupers acquired a settlement in the parish of Chertsey under the provisions of 39 & 40 Vict. c. 61, s. 34 (passed in 1876), by reason of their residence there under the circumstances above mentioned. The respondents on the other hand contended that though they lived at Chertsey their legal residence was with their father. The enactment in question, which created an entirely new mode of acquiring a settlement, viz., by mere residence, runs thus: "Where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the statutes in that behalf render him irremoveable, he shall be deemed to be settled therein."

The statutes rendering a person irremoveable are, first, 9 & 10 Vict. c. 66, s. 1 (passed in 1846), which enacts that "no person shall be removed, nor shall any warrant be granted for the removal of any person from any parish in which such person shall have resided for five years next before the application for the warrant"; 24 & 25 Vict. c. 55, s. 1 (passed in 1861), substituting three for five years, and 28 & 29 Vict. c. 79, s. 8 (passed in 1865), substituting one for three years; these statutes, however, conferred no settlement, they simply conferred a status of irremoveability.

The effect of this modern legislation may, for all practical purposes, be shortly summed up thus—One year's residence in a parish is sufficient to make a person irremoveable from it.—Three years of such residence confers a settlement upon such resident. Reading the plain and simple language of the statutes, one would have supposed that no difficulty could arise in determining where a person resided during any given time; nevertheless, the Courts have been constantly called upon to determine what is such *residence* as will satisfy the language of the statute relating to irremoveability, not because of any doubt as to where the paupers have actually lived; but because of endeavours which have been constantly made to have it judicially declared that though actually living in one parish, they have been "*constructively*" resident in another.

Now we take the law for all practical purposes to stand thus. Mere bodily presence or actual dwelling in a parish, though primâ facie, is not absolutely, sufficient to satisfy the statute; more is required. The residence must be such as to satisfy the tribunal before which the question arises, that the place of it was the home and fixed place of abode of the person whose settlement is disputed. If a person having a home of his own of which he is the head, or being a member of his father's family, and having his fixed home as of right or by permission at his father's house, quits it for a mere temporary purpose, intending on leaving and during all his absence to return to it so soon as the object of his absence is accomplished, and then to live in it as before—such mere temporary physical absence does not operate as a break in his residence at his father's home—though physically absent his residence continues. A man who goes from his home on a journey, or a visit, intending to return to it when his journey or his visit is over, though dwelling away from it for a time, cannot be said to be resident at the place where he is a mere visitor. On the other hand, if a person having a fixed home, whether as the head of it, or as being a member of a family, and whether emancipated or not, quits it with the intention not to return; or to return only upon the happening of some particular uncertain event, he cannot be said during his absence to reside in the home he has so quitted.

Whether the animus revertendi existed is always a question not of law but of fact, to be determined by the justices, having regard to the circumstances of each particular case, though of course it is a question of law whether there is *any* evidence to justify the justices in their finding, or whether the findings justify the adjudication. We mention this because it is becoming far too common a practice in cases on appeal to leave the judges to draw inferences of fact from other facts which are found; which we think is inconvenient and irregular.

In illustration and confirmation of the views we have expressed we may refer to the case of *Reg.* v. *Abingdon Union.* (1) In that case the pauper, who was blind, resided with his mother and her husband at Littlemore in the Abingdon Union from June, 1861, until August, 1862, when, being then fifteen years old, he was admitted as a pupil at the "School for the Indigent Blind," in which he lived and was maintained till July, 1868, when he returned to Littlemore, having no other place to return to, and there he remained with and was maintained by his mother and her husband till he became chargeable. During his stay at the school he had in each of the intervening five years visited for several weeks his mother and her husband. On appeal against an order for his removal to his birth settlement (he being an illegitimate child), the sessions adjudged him to be irremoveable, on the ground that he had been constructively resident in Littlemore for more than a year before the making of the order, and the Court of Queen's Bench held there was evidence to justify that finding—treating the question as being whether, during the whole time of the pauper's stay at the school, there was an animus revertendi in the pauper, without any idea of abandoning his old home with his parents. Blackburn, J., in the course of his judgment said, "the sessions had to draw inferences in order to decide whether the residence in Littlemore was broken or not during the time the pauper was in the asylum; and they drew the inference that there was an animus revertendi in the pauper, and adjudged that the pauper had constructively resided with his mother and her husband. I do not like the phrase, 'constructive residence'; when a person is physically absent from his place of residence for a time, if he has an animus revertendi his residence continues; and the question in such case is whether he continues to be resident, or has ceased to be resident by taking up his permanent residence elsewhere."

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(1) Law Rep. 5 Q. B. 409.

In *Reg.* v. *Glossop* (1) the pauper had quitted her parent's roof to go into service. She stayed in such service but a very short time and then returned to her old home; it was held nevertheless that her residence there had been broken, for when she left it there was no definite animus revertendi—and in *Wolstanton Union* v. *Northwich Union* (2), the pauper, who was born in 1860, lived with his father and after his death with his widowed mother in Wolstanton till 1872, when he was twelve years old, when he left her to go and reside at Maer, in the union of Northwich, and he continued to reside there till 1877. It was held that he had gained a settlement by residence in Maer and could not be removed to Wolstanton, though it was argued he could not gain a settlement living apart from his mother's home. See also *Merthyr Tydfil Union* v. *Stepney Union.* (3)

The authorities we have cited were cases in each of which the pauper was of an age and possessed of understanding capable of forming an intention for himself; therefore in them the question discussed was whether an animus revertendi existed in the pauper whose settlement or irremoveability was in dispute.

To the cases of children of tender age, whose place of abode is subject to the control and will of their parents, different considerations apply. In such cases, when the child is dwelling away from its father, the question seems to us rather to be, what were the intentions of the father with reference to it, than what were the intentions of the child. Of course, a father cannot relieve himself at will of his liability to maintain his child, but he can select its place of abode and determine for himself whether he will maintain and support his child in his own home, or in another home to be provided for it. In the former case, though the father may send his child away for a time, whether it be to school, to visit friends, or for any other purpose, if his intention is that when that purpose is fulfilled the child shall return to his home, no other place than that home can be said to be its *legal residence* for the purpose of gaining a settlement. But if in sending the child away from his home the father intended that its absence should be permanent, though he maintained it in all comfort in a new permanent abode, the residence of the child would in every sense be in the new and not in the old home. The case of *Reg.* v. *Leeds Union* (1) affords a good illustration of this view; there the pauper, an illegitimate female child, was, when about a *fortnight old*, placed by her mother in the care of John Oakes and his wife, and with them she lived in the parish of Seacroft from December, 1871, to February, 1878, and it was held that she had acquired a settlement in that parish under 39 & 40 Vict. c. 61, s. 34. In giving judgment, Cockburn, C.J., said: "It is true that where a child is under the authority and control of its parent it may, even when placed at a school in a different parish, be said to constructively reside with its parent. Here, however, the child had been entirely given up by its mother—it was not a suspension but a virtual abandonment of the maternal right. Circumstanced as she was, she asked Oakes and his wife to take the child off her hands, and the child resided with them in another parish without any intention on the part of the mother to resume her rights." And Lopes, J., said: "The case is distinguishable from that of a child placed at a school, for here the mother relinquished the custody of it altogether." In the present case there is no finding as a fact of any intention on the part of the paupers' father to receive the children back into his own home

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(1) Law Rep. 1 Q. B. 227; S. C. 35 L. J. (M.C.) 148.

(2) 46 L. T. 528.

(3) 53 L. J. (M.C.) 183; confirmed by the Court of Appeal since this judgment was written.

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(1) 4 Q. B. D. 323.

—it is not even alleged that he had a home in which he could receive them. The circumstances under which, immediately after their mother's death, he placed them with the Kings, in Chertsey, indicate a breaking up of his old home—and the fact that he never invited or had the children to visit him points in the same direction. The payment for their maintenance and clothes affords no evidence of an intention to take them back to live with him, for that was only in fulfilment of his legal obligation.

Having carefully considered the whole of the facts submitted to us, we are of opinion that there is no evidence to justify any other conclusion than that the paupers' residence with the Kings was, in fact, their permanent home—that there was no evidence that their father ever intended they should return to live with him, and that consequently they acquired a settlement by residence in Chertsey. This is the conclusion the justices should have come to. The order, therefore, must be quashed, with costs.

Order of sessions quashed.

Solicitor for appellants: *Rexworthy.*

Solicitor for respondents: *W. R. Francis, for Paine & Brettell, Chertsey.*

A. P. S.

Dec. 12.

[IN THE COURT OF APPEAL.]

Ex parte SHOOLBRED. In re ANGELL.

Bankruptcy—Costs as between Solicitor and Client—Bankruptcy Rules, 1883, *r.* 98.

Rule 98 of the Bankruptcy Rules, 1883, only empowers the Court to direct that costs shall be taxed and paid as between solicitor and client at the time when the order is made awarding the costs. If such a direction is not given at that time, the Court has no power to give it subsequently.

Appeal from order of Mr. Registrar Murray.

On the 13th December, 1883, Lewis Angell, a trader, filed a liquidation petition under the Bankruptcy Act, 1869, in the London Bankruptcy Court. On the 29th of December the creditors resolved to accept a composition of 5*s.* in the pound, and the resolutions were confirmed at the second meeting on the 12th of January, 1884. On the 29th of January, 1884, Mr. Registrar

Murray refused to allow the registration of the resolutions, and ordered the taxed costs of James Shoolbred (a dissentient creditor) of and incidental to opposing the application to register to be paid "out of the estate being wound up in bankruptcy."

A receiving order was afterwards made against the debtor on a bankruptcy petition presented by Shoolbred, and the debtor was ultimately adjudicated a bankrupt, and a dividend of 16*s.* in the pound was declared by the official receiver. On the 19th of June an application was made to the Court by the bankrupt to rescind the receiving order, on the terms, inter alia, of the creditors being paid 20*s.* in the pound, with interest. Shoolbred opposed this application, as did also the official receiver, and the registrar refused it, and ordered that the taxed costs of all parties appearing should be paid out of the bankrupt's estate. On the 9th of August, Shoolbred applied to the Court for an order that his costs, directed by the orders of the 29th of January and the 19th of June respectively, and also his costs of another order of the 6th of May, directed by that order to be taxed and paid out of the bankrupt's estate might, pursuant to rule 98 of the Bankruptcy Rules, 1883, be taxed and paid as between solicitor and client. The registrar refused this application. Shoolbred appealed.

Herbert Reed, for the appellant. But for the exertions of the appellant the creditors would not have obtained such a good dividend. His diligence has produced the fund for the creditors, and he is entitled to an order for payment of his costs as between solicitor and client, which the Court has power to make under r. 98. (1)

[COTTON, L.J. Is not the proper time to make the application the time when the order is made? The rule says that "in awarding the costs" the Court may direct the costs to be taxed as between solicitor and client.]

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(1) Rule 98 (1): "The Court in awarding costs may direct that the costs of any matter or application shall be taxed and paid as between party and party, or as between solicitor and client, or that full costs, charges, and expenses shall be allowed, or the Court may fix a sum to be paid in lieu of taxed costs."

(2) "In the absence of any express direction, costs of an opposed motion shall follow the event, and shall be taxed as between party and party."

The rule does not limit the exercise of the power to the time when the order is made. There is nothing to prevent the exercise of that power on a subsequent application. At the times when the orders in question were made it was not apparent that they would be productive of so much benefit to the creditors.

Macdonell, for the official receiver and the trustee, was not heard.

Brett, M.R. It seems to me that the meaning of rule 98 is this:—When the Court makes an order directing the payment of costs, then, at that time, in making that order, the Court has power to direct that the costs shall be taxed either as between party and party, or as between solicitor and client. The Court has power to do this at the time when it makes the order. The Court did not at the time when it made the orders which are now in question direct that the costs of them should be taxed as between solicitor and client. If there was any objection to the orders at the times when they were made, an appeal, if at all, should have been brought at once against each order. I do not mean to say that an appeal would not lie, but it would be as difficult an appeal to maintain as possible. It would be an appeal from the exercise of the registrar's discretion, and it would be very difficult to induce the Court of Appeal to say that he had exercised his discretion wrongly. It is, however, frankly admitted that those orders were right when they were made, and it seems to me that the rule would not enable the Court, leaving those orders standing, to make a new substantive order for the taxation of the costs of them as between solicitor and client. In my opinion the Court has no jurisdiction to do this, and it is now too late to appeal from the original orders, even if there were good ground for appealing.

Cotton, L.J. I am of opinion that the registrar was quite right. This is not an appeal against the orders which awarded the costs. Whether such an appeal would have been successful I do not say. But rule 98 says that the Court "in awarding costs" may direct that the costs shall be taxed as between party and party or as between solicitor and client. In my opinion that must of necessity mean that the Court may so direct at the time when the order is made which awards the costs. And I think so for this reason, that otherwise the Court would have on a subsequent application to consider the circumstances under which the previous order had been made, to unrip the whole of the proceedings, in order to see whether the conduct of the person who was making the application had been so meritorious that he ought not only to have his costs, but to have them taxed as between solicitor and client. It is a very unusual thing to give costs as between solicitor and client, except in the case of a trustee.

Lindley, L.J. I am of the same opinion. If we were to accede to this application we should be opening the door to applications which would produce inconveniences of the greatest magnitude. The rule empowers the Court to give the direction "in awarding costs," and the meaning is that when the matter is fresh in the mind of the Court then is the time for it to decide in which way the costs are to be taxed.

Appeal dismissed.

Solicitors for appellant: *Hindson Miller & Vernon.*
Solicitor for official receiver and trustee: *W. W. Aldridge.*

W. L. C.

[IN THE COURT OF APPEAL.]

Dec. 12.

Ex parte BENWELL. In re HUTTON.

Bankruptcy—Setting aside "Salary or Income" of Bankrupt for Creditors—Future Earnings of Professional Man—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71, *s.* 90.

The word "income" in s. 90 of the Bankruptcy Act, 1869, applies only to an "income" ejusdem generis with a "salary," and does not enable the Court to set aside for the benefit of the creditors of a professional man, who is an undischarged bankrupt, any part of his prospective and contingent earnings in the exercise of his personal skill and knowledge.

Appeal from decision of Mr. Registrar Pepys refusing to order part of the future income of the bankrupt to be applied in payment of his debts.

Robert Howard Hutton was adjudicated a bankrupt on the 4th of February, 1880. He was described as a "bone-setter," that is, he performed surgical operations, though he was not a member of the College of Surgeons, and he earned a large income by the exercise of his profession, having acquired a great reputation for skill in the treatment of his patients. His debts amounted to more than 20,000*l.*

On the 17th of August, 1884, the bankruptcy not having been closed, and the bankrupt not having obtained a discharge, the trustee applied to the Court for an order, under s. 90 of the Bankruptcy Act, 1869, for the payment of part of the bankrupt's salary or income to the trustee for the benefit of the creditors under the bankruptcy.

In support of the application the trustee deposed that the bankrupt had stated to him that he earned 1500*l.* a year. The trustee had inspected a diary of the bankrupt which contained entries relating to operations performed by him. Some of these entries had sums of money set against them; others had not. The bankrupt stated that the latter entries referred to operations the fees for which were paid in cash at the time. The trustee found that the sums of money entered in the diary amounted from the 1st of January to the 6th of May, 1884, to 477*l.*, which would give an income of 1350*l.* a year, besides the fees paid in cash at the time. The bankrupt's pass-book with his bankers shewed that from the 4th of May, 1883, to the 21st of May, 1884, he had paid in sums amounting to 4387*l.* 12*s.* 1*d.*, nearly the whole of which had been drawn out. Of the moneys drawn out sums amounting to 1169*l.* 17*s.* were drawn by cheques payable to "Hutton" or "self." The bankrupt had a wife and one young child, but she was living separate from him, and she was under her marriage settlement entitled to a separate income of 300*l.* a year. The bankrupt employed no skilled assistant in his business.

The bankrupt made an affidavit in which he denied having told the trustee that he had earned 1500*l.* a year since his bankruptcy, or thereabouts, and he said that the amount of the fees mentioned in his diary was only 394*l.* (not 477*l.* as stated by the trustee), of which 73*l.* 10*s.* had never been paid, and he believed never would be. He said that the cheques in the names of "Hutton" and "self," referred to by the trustee, were

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drawn out for the support of himself and his wife and child. The capital settled on his wife had been lent to him by the trustee, and he had to pay interest on it, which was in arrear. His wife and child were living in France on account of the wife's ill health, and he was frequently with them, and supplying them with money towards their support.

The registrar refused the application with costs, on the ground that there was no precedent for making such an order in relation to professional earnings. The trustee appealed.

Cooper Willis, Q.C., and *J. E. Palmer*, for the appellant. The application was made under s. 90 (1) of the Bankruptcy Act, 1869.

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(1) Sect. 88: "Where a bankrupt is a beneficed clergyman, the trustee may apply for a sequestration of the profits of the benefice, and the certificate of the appointment of the trustee shall be sufficient authority for the granting of sequestration without any writ or other proceeding, and the same shall accordingly be issued as on a writ of levari facias founded on a judgment against the bankrupt, and shall have priority over any other sequestration issued after the commencement of the bankruptcy, except a sequestration issued before the date of the order of adjudication by or on behalf of a person who at the time of the issue thereof had not notice of an act of bankruptcy committed by the bankrupt, and available against him for adjudication, but the sequestrator shall allow out of the profits of the benefice to the bankrupt, while he performs the duties of the parish or place, such an annual sum, payable quarterly, as the bishop of the diocese in which the benefice is situate directs; and the bishop may appoint to the bankrupt such or the like stipend as he might by law have appointed to a curate duly licensed to serve the benefice in case the bankrupt had been non-resident."

Sect. 89: "Where a bankrupt is or has been an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the civil service of the Crown, or is in the enjoyment of any pension or compensation granted by the Treasury, the trustee during the bankruptcy, and the registrar after the close of the bankruptcy, shall receive for distribution amongst the creditors so much of the bankrupt's pay, half-pay, salary, emolument, or pension as the Court, upon the application of the trustee, thinks just and reasonable, to be paid in such manner and at such times as the Court, with the consent in writing of the chief officer of the department under which the pay, half-pay, salary, emolument, pension, or compensation is enjoyed, directs."

Sect. 90: "Where a bankrupt is in the receipt of a salary or income other than as aforesaid, the Court upon the application of the trustee shall from time to time make such order as it thinks just for the payment of such salary or income, or of any part thereof, to the trustee during the bankruptcy, and to the registrar if necessary after the close of the bankruptcy, to be applied by him in such manner as the Court may direct."

Sect. 90 speaks of "salary *or* income." In *Ex parte Huggins* (1) the Court ordered a part of the pension of a retired colonial judge, who had become a bankrupt, to be paid to his trustee. And the Court held that all the matters dealt with by ss. 88–90 are "property" of the bankrupt and vested in the trustee, though subject to the power of the Court to determine how much shall be set aside for the benefit of the bankrupt's creditors. Though they are "property" of the bankrupt, still the trustee cannot take them except under the direction of the Court. "Income" must mean something different from a "salary," though, as was held in *Ex parte Wicks* (2), a purely voluntary allowance is not income.

[Brett, M.R. In *Ex parte Huggins* (1) the pension was something in the nature of a salary. According to the ordinary rules of construction "income" must be something ejusdem generis with a "salary."]

In *Wadling* v. *Oliphant* (3), Blackburn, J., said (p. 149), referring to *Williams* v. *Chambers* (4): "It was held that the assignee could not claim this money, the price of the personal services of the insolvent. Now, whether that judgment applied to such part only of his earnings as was reasonably necessary for his subsistence does not appear. It is unnecessary to say whether it would extend to the case of an actor or a professional man who makes a large income, and whether in such a case the assignees could make no claim." In *Emden* v. *Carte* (5) the question was whether the remuneration of an architect in respect of employment under a contract entered into before his bankruptcy, and damages for his wrongful dismissal from his employment, passed to his trustee in bankruptcy, and Jessel, M.R., said (p. 769), that the burden was on the bankrupt to prove that they did not. And Lush, L.J., said (p. 770), "The Act made all the property acquired after the adjudication pass to the trustee. It has been held that what the bankrupt earns by daily labour to support life does not vest in the trustee. But if he earns a margin, that is a profit and goes to the trustee."

(1) 21 Ch. D. 85.

(2) 17 Ch. D. 70.

(3) 1 Q. B. D. 145.

(4) 10 Q. B. 337.

(5) 17 Ch. D. 768.

[Brett, M.R. Where does the Act say that the bankrupt is entitled to retain an amount sufficient to keep himself? If you are right, the whole of his personal earnings are the property of the trustee.]

The moment the money came into the bankrupt's hands it vested in the trustee, though it vested subject to the provisions of s. 90, and the trustee must apply to the Court under that section.

If there is a margin above what is reasonably necessary for the bankrupt's support, the trustee ought to have it. It is for the bankrupt to shew that the money has resulted simply from the exercise of his own brains.

[Lindley, L.J. Your argument comes to this, that, even if the Court makes no order, the trustee can take the money by virtue of s. 15 of the Act, which defines the property of the bankrupt which vests in the trustee.]

At any rate it is for the bankrupt to prove that the money is of the nature of purely professional earnings; it is sufficient for the trustee to shew that he is in the receipt of money. But, treating it as "income" within s. 90, the trustee ought to have the surplus beyond a reasonable allowance for the support of the bankrupt. In *Elliott* v. *Clayton* (1) it was held that the assignees in bankruptcy of a surgeon and apothecary were entitled to the proceeds of his business, which were the result to a great extent of his personal labour. The Court held that the case could not be materially distinguished from *Crofton* v. *Poole* (2), in which the bankrupt was a furniture broker, and it was held that his assignees were entitled to a debt due to him for the removal of furniture. In *Ex parte Banks* (3) an undischarged liquidating debtor contracted to paint a yacht for 49*l.* He received 7*l.* on account during the progress of the work, and it was held that the trustee was entitled to the whole of the balance of 42*l.*, though it represented partly the debtor's personal labour, partly wages of workmen, and partly the cost of materials.

The bankrupt could recover his fees in an action, and this right vests in the trustee under s. 15 of the Act. Sect. 19 also applies.

[Cotton, L.J. Suppose the Court to say that all that the bankrupt may earn above 500*l.* a year is to go to the trustee; what is to prevent the bankrupt from saying, after he has earned the 500*l.*, I will take no more fees?]

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(1) 16 Q. B. 581.

(2) 1 B. & Ad. 568.

(3) 4 Ch. D. 689.

The bankrupt might be ordered to keep an account of what he receives.

T. L. Wilkinson, for the bankrupt, was not heard.

Brett, M.R. Mr. Hutton carries on the business of a surgeon, though he is not a member of the College of Surgeons. He is known by the colloquial name of a "bone-setter," and by the exercise of a great deal of well-known skill he earns a considerable income. It is the result of his own personal skill and knowledge. He does not earn any money by selling or supplying to his patients any materials. He is not like a person who earns money by the sale of articles on which he has exercised his skill. A cabinet maker exercises skill in the making of cabinets, but he earns money by selling the cabinets which he makes. His business does not consist only in the exercise of his personal skill and knowledge, but he sells the things which are the product of the exercise of that skill and knowledge. Mr. Hutton earns an income only by the exercise of his personal skill as a "bone-setter." The trustee's application was not for an order dealing with any property which was in the bankrupt's possession, or any chose in action to which he was entitled, but it asked the Court to deal with the proceeds of his personal skill and knowledge which had not yet been earned, and which might or might not be earned. The application asked the Court to deal with the income which the bankrupt might earn in this way, and which, if he did earn it, would, it was said, amount on the average to 1500*l.* a year. It appears to me that such earnings of a bankrupt which may or may not arise, and which do not depend on any contract, are not property of the bankrupt which passes to his trustee under any of the previous sections of the Act. It is impossible to say that anything of this nature is "property." It might as well be said that the possibility of a bankrupt's having a sum of 20,000*l.* when he dies is "property" within the meaning of the Act. Sect. 89 deals with cases in which the bankrupt is entitled, either by the bounty of the Crown or under some Act of Parliament, to some "pay, half-pay, salary, emolument, or pension." He is entitled to one of these things, though he has not got it actually in possession, but he is certain to have it if things go on as they are. And the Court is empowered to deal with matters of this kind, though they are not comprised in any of the previous sections of the Act, for the bankrupt is certain to have them though they have not yet come into his possession. Sect. 90 goes further still, and enables the Court to deal with "a salary or income other than as aforesaid" of which the bankrupt is in the receipt. What is the meaning of the word "salary" in the section? It must be a salary of the same kind as those things which have been already mentioned, though it is not paid in respect of similar services. Then there is the general word "income." The rule is that general words added to particular words do not include everything which would come within them according to the literal meaning of the English language, but are to be limited to things ejusdem generis with those things which have been previously mentioned. "Income," therefore, must mean "income" in the nature of a "salary." The trustee asks for an order to allocate to the payment of the creditors a part of the income which the bankrupt may earn by means of fees paid to him by his patients during the continuance of the bankruptcy. This, therefore, is alleged to be income of the same nature as a salary, and the question is whether the income which a man earns by the exercise of his personal skill, and which is dependent upon the accident whether people come to consult him or not, and upon whether he chooses to be consulted, is income of the nature of a salary. It is only necessary to state the case to shew that it is not. Therefore these earnings are not within s. 90, and cannot be dealt with in the way which the trustee asks.

Cotton, L.J. This is an appeal from the refusal of the registrar to make an order under s. 90 for the payment of a part of the bankrupt's income to the trustee during the bankruptcy. What the trustee is asking for is a prospective order for the payment to him of a part of something which it is contemplated that the bankrupt may earn. It is quite different from the case of a bankrupt who is entitled under a contract entered into before the bankruptcy to receive money after the bankruptcy. The question is whether a prospective order can be made. What had the bankrupt in the present case? He had only the natural capacity and skill to earn an income in the future, if people should choose to come to him as patients. It is only the capacity of earning money. That is the only property which could vest in the trustee under the order. This capacity of earning money could not be sold so as to make the possessor of the skill the slave of the purchaser. There is nothing of the nature of property which could vest in the trustee. In the cases provided for by s. 88 the bankrupt has a right, if things go on as they are, to receive a specific sum every year, and then a part of that sum can be set aside and paid to the trustee for distribution among the creditors. Is not s. 90 intended to deal with something of the same nature? In my opinion it is. It speaks of an order for the payment to the trustee "of such salary or income, or any part thereof." In my opinion the Court cannot under s. 90 deal with the capacity which a man has to earn money by the exercise of his personal skill. It is impossible that any definite part of his earnings could be set aside. All that the Court could do would be to order that the excess of his income above a certain fixed amount should be set aside, and paid to the trustee. But how could the Court force the bankrupt to go on working? In my opinion s. 90 points to some definite annual amount which is coming to the bankrupt, and in such a case a part of it can be set aside for the benefit of his creditors. I think, therefore, that the registrar was right in refusing the application. It does not appear that such an order has ever yet been made with regard to an income of this kind, and I think that the Court ought not to make a precedent. Upon the evidence, I take it that the bankrupt's income is derived solely from the exercise of his personal skill.. The evidence all points to fees paid to him for professional services, fees paid in respect of the exercise of skill in dealing with broken or wounded bones, and not in respect of the exercise of skill in making materials more valuable and then selling them.

Lindley, L.J. I also am of opinion that this case is not within s. 90. This gentleman is carrying on the business or profession of a surgeon. His income is perfectly precarious; it depends on the number of persons who come to him as patients. There is nothing in it of the nature of a pension or salary; there is an element of uncertainty in it. We are asked to impound a portion of his future earnings for the benefit of his creditors. It is obvious that he could defeat the order by declining to see any patients. Whether it would or would not be for his interest to do so is immaterial. It appears to me that an income of this nature cannot be impounded under s. 90. In *Ex parte Huggins* (1) the income of the bankrupt was a pension payable by a Colonial Government, and was analogous to the pensions which are referred to in s. 89. That affords an illustration of the kind of case which s. 90 was intended to meet. No other case of importance has been referred to except *Emden* v. *Carte* (2), which does not really touch the present point. That case only decided that the trustee of a bankrupt could insist on suing for damages for the breach after the bankruptcy of a contract which had been entered into with the bankrupt before the bankruptcy. The question is whether the professional earnings of the present bankrupt are an "income" of such a nature as is pointed at by s. 90, and, for the reasons which have been already given, I think that they are not. It is curious that before the present application no one should ever have thought of asking for an order to impound an income of this nature.

Appeal dismissed. (3)

Solicitor for trustee: *Thomas Durant, jun.*
Solicitor for bankrupt: *W. Maynard.*

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(1) 21 Ch. D. 85.

(2) 17 Ch. D. 768.

(3) See Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 53.

W. L. C.

1884
Dec. 19.

[IN THE COURT OF APPEAL.]

Ex parte MOSS. In re TOWARD.

Bankruptcy—Relation back of Trustee's Title—Assignment of Debt—Ship—Building Contract—Completion by Trustee.

A shipbuilder agreed to build a vessel, the price to be paid in specified instalments. Part of the work having been done, but less than the value of such part having been paid to the builder, he charged in favour of a creditor the instalment due to him on the delivery of the vessel. Before the ship was completed he became bankrupt. The trustee in the bankruptcy completed the vessel, and in so doing expended less than the amount which remained to be paid by the purchaser:—

Held, that the charge, being upon money which had been already earned by the builder, was valid as against the trustee.

Ex parte Nicholls (22 Ch. D. 782) and *Tooth* v. *Hallett* (Law Rep. 4 Ch. 242) distinguished.

Appeal from a decision of the judge of the Newcastle County Court holding that Messrs. H. E. Moss & Co. were not entitled to any charge upon certain moneys received by the trustee in bankruptcy.

On the 5th of May, 1883, a contract was entered into between Messrs. T. and W. Toward & Co., shipbuilders, at Low Benwell, and Messrs. Leech, Harrison & Forwood, shipowners, at Liverpool, by which the builders undertook to build for the purchasers a steamship of the dimensions, power, and class therein specified. The contract contained (inter alia) the following provisions:—

(2.) The vessel was to be ready for delivery by the 8th of March, 1884, and in default for every week's delay beyond that date the builders were to pay the purchasers 10*l.* as liquidated damages, the amount at the option of the purchasers to be deducted from the purchase-money.

(3.) The purchase-money was to be 7150*l.*, payment to be made as follows:—

"When keel laid and framed, and angles are in the yard, 750*l.* in cash.

"When framed, 500*l.* in cash and 500*l.* in bills.

"When plated, 500*l.* in cash and 500*l.* in bills.

"When launched, 500*l.* in cash and 500*l.* in bills.

"When engines and boilers are lifted on board in position, 500*l.* in cash and 500*l.* in bills.

"On delivery, 2400*l.* in cash."

The bills to be "buyers' acceptances of sellers' drafts, to be drawn at such dates (and renewed if necessary) so as to fall due when steamer is delivered."

This contract was obtained for Toward & Co. through the agency of Messrs. H. E. Moss & Co., shipbrokers, at Liverpool.

The construction of the vessel was delayed, and at the end of February, 1884, the work was about two months in arrear. The vessel was not launched until about the 25th of February, 1884. At this time the builders had received from the purchasers in cash or in bills 3950*l.*, which was 200*l.* more than they were entitled to under the contract. On the 4th of March, 1884, Moss & Co. having been pressing for payment of the commission due to them by Toward & Co., Toward & Co. signed the following letter addressed to the purchasers: "Please pay to Messrs. H. E. Moss & Co. the sum of 129*l.* 7*s.* 6*d.* out of the instalment due to us when boat is delivered." This letter was sent to Moss & Co. and was by them communicated to the purchasers. On the 15th of March Toward & Co. filed a bankruptcy petition in the county court, and on the same day a receiving order was made. After some ineffectual proceedings with a view to a composition, the debtors, on the 24th of May, 1884, were adjudicated bankrupts, and on the 30th of May Henry Chapman, who had on the 17th of March been appointed special manager of the debtors' business, was appointed trustee of their estate. He proceeded with the construction of the vessel, and on the 20th of June she was completed and delivered to the purchasers. During the progress of the work from the 22nd of March to the 21st of May, the purchasers made him various payments on account of the price amounting to 600*l.*, and on the 20th of June they paid him 512*l.* A sum of 429*l.* 7*s.* 6*d.* (being the amount of the charge in favour of Moss & Co., and of a similar charge of 300*l.* given by the debtors in favour of a firm of Hawks & Co.) was retained out of the balance due by the purchasers, and was deposited in a bank in joint names to abide the decision of the Court as to the validity of the two charges which was disputed by Chapman as trustee.

The purchaser had paid 4280*l.* to the debtors before the appointment of Chapman as manager; and 1200*l.* had been paid to the sub-contractors for the engines of the vessel. Chapman expended 839*l.* in completing the vessel. The ultimate balance due by the purchasers was sufficient to cover the 839*l.* and the 429*l.* 7*s.* 6*d.* Chapman deposed that the contract had not resulted in any profit to the debtors' estate. The judge held, on the authority of *Ex parte Nichols* (1), that the charge in favour of Moss & Co. was void as against the trustee in the bankruptcy. Moss & Co. appealed. The trustee had also raised a question of fraudulent preference, which it became unnecessary to decide.

J. Lawson Walton, for the appellants. *Ex parte Nichols* (1) is distinguishable from the present case. In that case the debtors were the lessees of the Alexandra Palace, and they entered into an arrangement with the Great Northern Railway Company that the company should, in addition to the railway fare paid by persons travelling over their line to the palace, receive the sums payable by the passengers for admission to the palace, and that the gross sum paid by each passenger for railway fare and admission should be divided between the company and the lessees in a defined proportion, the railway company accounting to the lessees monthly. Afterwards the lessees, as security for an advance made to them by another person, assigned to him "all and every the sums and sum of money now due and owing and hereafter to become due and owing" from the railway company to the lessees, and notice of the assignment was given to the company. It was held that the assignment was void as against the trustee in the liquidation of the assignors as regarded the moneys which became due from the railway company to the assignors after the filing of the liquidation petition. There the debtors had no property in the money received by the railway company for admission to the palace until it was received by the company. The lessees had no contract with the persons who paid for admission. In the present case what the bankrupts assigned was a right of property which they could have sold in the market. The trustee could take the last instalment only subject to the charges on it. It was a valid equitable assignment within the decision of *Brice* v. *Bannister*. (1) It is an equitable assignment of the bankrupts' interest under the contract, an assignment of that which became due to them when the final instalment should be paid.

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(1) 22 Ch. D. 782.

Tooth v. *Hallett* (2) does not apply. There an assignment was made by a builder of part of the amount due to him on a building contract. Nothing became due to him, because he was unable to complete the contract, and it was completed by another person, who was paid for his work by the builder's employer.

It may be contended that the document of the 4th of March was really a bill of exchange, and that it was inoperative because it was not stamped. But *Brice* v. *Bannister* (1) shews that it was not a bill of exchange.

Pollard, and *Mitcalfe Dale,* for the trustee. *Tooth* v. *Hallett* (2) applies, and shews that the right to receive money at a future time is not property which is assignable as against the trustee in bankruptcy of the assignor.

The contract resulted in a loss to the bankrupts' estate; the trustee has to meet claims on the estate for materials supplied to the bankrupts. The right to the final instalment vested in him by virtue of the relation back of his title, so as to override the assignment, and the work which the trustee had done since the bankruptcy has caused the money to become payable. At the date of the assignment there was no money due under the contract to the bankrupts, and no money growing due to them under it the right to receive which depended only on lapse of time. The case is quite different from that of a building contract where a certain percentage of money actually earned is retained by the purchaser after it has been earned by the builder. There was no debt due to the bankrupts at the time when they made the assignment. The money was to become payable only if something was done by the bankrupts, and that something was done not by them, but by the trustee. The trustee has taken the burden of the contract, and he is entitled to the benefit of it.

Moreover, the assignment is really a bill of exchange within the definition contained in s. 3 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). *Ex parte Shellard.* (3)

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(1) 3 Q. B. D. 569.

(2) Law Rep. 4 Ch. 242.

(3) Law Rep. 17 Eq. 109.

[Cave, J. At least three of the conditions mentioned in s. 3 are not complied with in this case; it is not an unconditional order for payment; it is not an order to pay on demand, or at a fixed or determinable future time; and it is not an order to pay to the order of a specified person or to bearer.

Mathew, J. It was evidently intended to be a charge, not a bill of exchange.]

It is in effect an unconditional order to pay.

Mathew, J. I am of opinion that, upon the point whether *Ex parte Nichols* (1) applies to the charge in favour of the appellants, the judgment of the learned county court judge was wrong, and the appeal must be allowed.

The actual state of things at the time when the charge was made may be stated in this way. Speaking roughly, about six-sevenths of the work to be done under the contract had been actually done, and about two-sevenths of the work (speaking again very roughly, and for the purpose of illustration only) remained to be paid for. In that state of things a charge is granted which was intended to operate upon the margin payable in respect of the execution of the work out of what, as a matter of fact, had been actually earned by the builders at the time when the charge was granted. It was admitted in the course of the argument, that, if the margin had been created in the way in which a margin sometimes comes into existence under a building contract, viz., by the reservation of a certain percentage of each instalment, if such a reservation had been made, and the sum so reserved was not to be payable until some time after the completion of the work, it could not be questioned that a valid charge might be made upon that margin as a subject of property. I am unable to distinguish in principle such a case from the present case. The position of the contracting parties in each case appears to me to be exactly the same. In the one case the money has been earned under the terms of the contract, and in the other, the contractor is compelled by the terms of the contract to spend more than he receives. The position of the contractor in each case is in principle the same. But it is said that the case is concluded by the authority of *Ex parte Nichols* (1) which is, of course, binding upon us if it is in point. But when you look at *Ex parte Nichols* (1) it is plain that the ground of the decision was that the subject of assignment was something which had not been earned by the assignor. The subject of the assignment was something which could only be earned after the assignment was made. Jessel, M.R., in his judgment, put the case clearly upon that footing. He said (2), "It is really the same thing as if the money had been paid by the public at the doors of the Palace. It represents gross earnings of the persons who are carrying on the trade. When a man becomes a bankrupt the bankruptcy relates back to the act of bankruptcy on which it is founded, and the receipts from his business after the date of the act of bankruptcy, though they are in the hands of an agent who has received them, pass to the trustee in the bankruptcy. The income derived from the business after the act of bankruptcy passes to the trustee. The business of the Palace being carried on, these sums are payments made by the customers to the man who was carrying it on. They stand in the same position as payments made by the public for admission to a theatre, or payments made by the customers of a man who keeps a cheesemonger's shop." The analogy on which the Master of the Rolls relies is that of a business carried on and profits earned in it, shewing that he regarded the subject of the assignment as something which had not been earned at the date of the assignment. "That being so, it is clear that the title of the trustee relates back to the act of bankruptcy, i.e., to the filing of the petition. But it is said that the payments were received by the railway company under a contract which the trustee affirms. That is a fallacy. The trustee would have had a right to the debtors' share of the gross sums received by the company, even if he had annulled the contract. His affirmance of the contract was only an assent to the division of the gross sums in the proportion there laid down; he did not adopt the contract in any other sense. That being so, his title is quite unaffected by any assent to the contract. Then it is said that the respondents are claiming under a mortgage or assignment made to them by the bankrupts before the bankruptcy. The answer to that is, that by no assignment or charge can a bankrupt give a good title as against his trustee to profits of his business accruing after the commencement of the bankruptcy. The bankrupt cannot, as against the trustee, assign these profits: they are not his property." It is perfectly clear that the ratio decidendi is this,—that which is earned at the date of the assignment, and is the subject of property, may be assigned, while that which remains to be earned cannot be assigned. So much for that point.

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(1) 22 Ch. D. 782.

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(1) 22 Ch. D. 782.

(2) 22 Ch. D. 785.

There remains the question of fraudulent preference. This part of the case has not been dealt with by the learned county court judge, and the facts have not been thoroughly investigated. We will therefore give the trustee the option of investigating this matter further before the county court judge, at the risk of having to pay the costs in respect of that claim if he should fail.

The learned county court judge having the materials before him will deal with the costs as he in his discretion shall think fit.

Cave, J. I am of the same opinion. I wish to add a few words upon the cases which have been cited. There are observations in *Ex parte Nichols* (1), and particularly an interlocutory observation of Jessel, M.R., which to my mind are capable of being misunderstood, and I can well believe that the learned county court judge may have supposed that in deference to *Ex parte Nichols* (1) he was bound to come to a conclusion which, as I gather from what has been said, was somewhat repugnant to his own ideas of justice. I am glad to say that that is not what the law requires. In *Ex parte Nichols* (1) the facts were very different from those of the present case. The present case would be analogous to *Ex parte Nichols* (1) if, for instance, the debtors had on the 31st of December last executed a charge upon all moneys which they should be entitled to receive under contracts entered into by them during the year 1884, and had on the 1st of January become bankrupt, and the trustee in the bankruptcy had then carried on the business, entered into contracts, and received money under those contracts. If the person to whom the charge which I have supposed had been given had sought to get from the trustee the moneys which he had earned by carrying on the business, and by completing the contracts entered into after the bankruptcy, then undoubtedly the principle of *Ex parte Nichols* (1) would have applied. Again, with regard to *Tooth* v. *Hallett* (2), if in the present case there had been so little work done, or so much money received by the debtors for what had been done, that, after completing the vessel, the sum due to them from the shipowners was not sufficient to pay, or not more than sufficient to pay, what the trustee had had to expend in the completion of the vessel, then it is clear that *Tooth* v. *Hallett* (2) would have applied, and that there would be nothing left which could be attributed to the work done by the debtors, or to which, consequently, the persons holding the charge could have any right. But in this particular case the facts are entirely different. Suppose the case of a man who was within 100*l*. of finishing a contract, which would entitle him on completion to receive 5000*l*., and he went to a tradesman and said, "I want materials to finish this contract; let me have 50*l*. worth of materials, and I will give you a charge upon the 5000*l*. instalment which is coming to me, and of which I have already earned 4900*l*.;" if before he could finish the work he became bankrupt, it might just as well be said that his trustee was entitled to finish the contract at the expense of 100*l*., and take the whole of the 5000*l*., without regard to the charge which had been given by the bankrupt. I cannot conceive anything which would be more unjust, or which would more interfere with a perfectly legitimate attempt by a trader to raise money when he happened to be in want of it for the purpose of completing a lucrative contract, and I should be very sorry if I were compelled to hold that that was the law. I am satisfied that it is not, and that this case does not fall within either *Ex parte Nichols* (1) or *Tooth* v. *Hallett*. (2) Consequently, as to that part of the case, the decision of the county court judge must be reversed. The trustee must pay the costs of the appeal on this point.

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(1) 22 Ch. D. 782.

Appeal allowed.

Pollard asked for leave to appeal to the Court of Appeal.

THE COURT refused the application.

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(1) 22 Ch. D. 782.

(2) Law Rep. 4 Ch. 242.

Dec. 19. *Pollard* renewed the application for leave to appeal in the Court of Appeal ex parte.

BRETT, M.R. It appears to me that the merits of the case are entirely against the trustee, and I do not think there is any doubt about the point of law such as would justify us in allowing an appeal.

COTTON and LINDLEY, L.JJ., concurred.

Solicitors for appellants: *W. W. Wynne & Son, for H. Forshaw & Hawkins, Liverpool.*

Solicitors for trustee: *J. E. & H. Scott, for T. Tinley Dale, South Shields.*

W. L. C.

[IN THE COURT OF APPEAL.]

Nov. 28.

BOOTH *v.* SMITH.

Rent-charge—Apportionment—Release of Part of the Hereditaments—22 & 23 *Vict. c.* 35, *s.* 10.

The effect of 22 & 23 Vict. c. 35, s. 10, is that where the owner of land, which is subject to a rent-charge, sells and conveys such land in separate portions to different persons, and the person entitled to the rent-charge joins in the conveyance of one only of such portions and releases it from the rent-charge, without the concurrence of the person to whom the other portion has been conveyed, the whole of such rent-charge is not extinguished, but only a proportionate part of it can be recovered from the person to whom the unreleased portion was conveyed.

APPEAL from the judgment of Stephen, J., upon the trial of an action for arrears of a rent-charge.

It appeared that Frederick Griffiths, who died in March, 1875, by his will, dated the 28th of September, 1874, devised to his son, William Griffiths, in fee his house, shop, and premises in Epping, with his garden, stabling, and appurtenances, subject to and chargeable with an annuity of 20*l.* to his daughter (the plaintiff in this action) for her life.

In 1876 William Griffiths sold part of such hereditaments to the defendant for 80*l.*, and he afterwards conveyed the residue of such hereditaments to one George Wright for 350*l.* The sale to George Wright was free of the annuity charged thereon, and the plaintiff was a party to the deed of conveyance and joined with W. Griffiths in releasing the part of the hereditaments conveyed to Wright from her annuity, but she was no party to the deed conveying the part which was sold to the defendant, and which was so conveyed to him unreleased from this annuity. The conveyance to Wright, though made afterwards, was in performance of a contract of purchase made prior to the purchase by the defendant.

The present action was brought by the plaintiff to recover five years arrears of her annuity of 20*l.* charged, inter alia, on the hereditaments which had become vested in the defendant.

The action was tried before Stephen, J., without a jury, when that learned judge gave judgment for the defendant, being of opinion that as the defendant did not concur in releasing the hereditaments conveyed to Wright, the 10th section of 22 & 23 Vict. c. 35 (1), had not the effect of preventing the extinguishment of the whole rent-charge by the release of part of the land charged therewith.

The plaintiff appealed.

Barber, Q.C., and *J. Cutler*, for the plaintiff. The question in this case is as to what is the proper construction of s. 10 of 22 & 23 Vict. c. 35. There has hitherto been no case in which any Court has had to construe the latter part of that section and to determine who are the "parties interested" therein referred to, and what are their rights which are so preserved by that clause. The decision of Stephen, J., practically nullifies the enactment which was intended to get rid of the inconvenience of the old law by which the release of part of the land charged with an annuity was a release of the whole land. Sheppard's Touchstone, by Preston, p. 345, shews some of the contrivances of conveyancers to evade that law and the inconvenience which it occasioned. The object of the enactment was to remedy this, and to enable part of the land to be released without extinguishing the whole rent-charge. The latter part of the 10th section means by the "parties interested" the owners of the land subject to the rent-charge; in this case William Griffiths. The plaintiff, the annuitant, after having released the portion conveyed to Wright, was entitled to have her annuity out of that part of the land which was unreleased, and to leave the defendant to get contribution from the owner of the other portion of the land, such right to contribution being the only right which could be preserved to him by the 10th section. But at all events the whole annuity was not gone, and the plaintiff was at least entitled to recover a proportionate part from the defendant. With reference to the point as to whether the defendant is personally liable to be sued in this action the case of *Thomas* v. *Sylvester* (1) is an authority that since real actions have been abolished by 3 & 4 Wm. 4, c. 27, debt lies for the rent-charge against the terre tenant.

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(1) By s. 10 of 22 & 23 Vict. c. 35: "The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released, without prejudice nevertheless to the rights of all parties interested in the hereditaments remaining unreleased, and not concurring in or confirming the release."

J. G. Witt (*Gilbert Metcalfe*, with him), for the defendant. If the plaintiff has a right to recover the whole annuity from the defendant then the defendant would be entitled to recover contribution from Wright, whose land had been expressly released by the plaintiff, which would have the effect of nullifying the statute, and the intention of the parties to the conveyance to Wright to bar the right to recover any part of the annuity out of the released portion of the land. The defendant, moreover, is a "person interested" within the meaning of the latter part of the 10th section, and not having concurred in or confirmed the release of the portion conveyed to Wright his rights are preserved, and those rights must be the rights he would have had if the statute had not been passed, namely, the right to be released altogether by the release of part of the land from the rent-charge. Next even assuming this annuity to be a legal rent-charge, no personal action will lie against the defendant to recover it, but in fact it is not a legal but only an equitable rent-charge, and no such action as this will now lie for it.

J. Cutler, in reply.

Brett, M.R. In this case the plaintiff had an annuity of 20*l.* a year, which was a rent-charge on certain property. The owner of that property parted with the whole of it, but at different times and to different persons; part of it he sold at one time to the defendant, and the other part he afterwards sold to one Wright. When Wright purchased his portion of the land the owner of it released him from the rent-charge thereon, and the plaintiff, the annuitant, joined in such release, so that that portion of the land sold to Wright was released from the annuity. The annuitant, however, was no party to the deed by which the land was sold to the defendant unreleased from her annuity, and the question which has arisen is whether she can sue the defendant for the whole or any part of her annuity? One point taken by the defendant's counsel was that the form of action was wrong. It is immaterial to determine that, because when the alternative was put to him whether there was any other form of action which he preferred, he declined to state any to which it might be altered. However, in my opinion, this being a rent-charge, if it, or any part of it, can be recovered at all, it can be recovered by an action of debt. That reduces the question to this, what is the effect of s. 10 of 22 & 23 Vict. c. 35? The owner of land subject to a rent-charge may desire to get part of the land released from the rent-charge whilst he remains owner of the other part of it, or he may wish to get rid of the whole of his land and he may do so, and the annuitant may concur only in releasing a part of it from the annuity. Under such a state of things it is said on behalf of the present plaintiff that the whole of the rent-charge would be payable out of the unreleased part, whilst on the other side the argument comes to this, that neither the whole nor any portion of the rent-charge would be payable out of the unreleased part. The first part of the section says: "The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released." Then the latter part of the section says this is to be without prejudice to the rights of persons interested in the "property remaining unreleased, and not concurring in or confirming the release." Take, then, the case of an owner of land who obtains the concurrence of the annuitant to the release of part of the land but remains the owner of the rest. In that case such owner would be a party concurring in and confirming the release, and therefore he, not being a person within the meaning of the latter part of the section whose rights in the unreleased part of the land were preserved, would be bound to pay the whole annuity in respect of such unreleased part. In the case now before us, however, the defendant is entitled to the benefit of this latter and saving part of the section, and his rights are preserved as he did not concur in or confirm the release. What then are those rights? If he had had to pay the whole of the annuity he would have had a right to contribution and would have been left ultimately to pay only that part of it which would have been the proper proportion payable in respect of his unreleased part of the land. Therefore, I think that, according to the rights reserved to him by the statute he ought to pay only such portion of the annuity as is represented by the proportion of his land to the land released, that is, about a fifth, or 4*l.* a year, and for that amount this judgment ought to be for the plaintiff.

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(1) Law Rep. 8 Q. B. 368.

COTTON, L.J. The action is brought for an annuity which was charged on certain land, and the defendant is the purchaser of part of the land which was so charged. On the sale of the other part of the land, the annuitant joined with the owner in releasing that part from the annuity. Under the old law the effect of such release of part of the land would have been that the annuity would have been gone altogether as a charge on the land. The inconvenience of this was great when the owner of the land desired to sell a part of it, and one of the modes adopted to get rid of the effect of the law was to have a re-grant of the annuity. The 10th section of the Act 22 & 23 Vict. c. 35, was passed to remedy this inconvenience. It says in the first part that the release from a rent-charge of part of the land charged shall not operate as a discharge of the whole land, but only of the part released. So far the enactment was contemplating only the case of the person selling being the owner of the whole of the land which was subject to the rent-charge, and selling a part discharged from the rent-charge with the concurrence of the person entitled to the rent-charge, and the effect of that would be to make the rent-charge recoverable only out of that portion of the land which had not

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been released from but remained subject to the rent-charge, and that is quite right, for there is no reason why the person who had been owner of the whole land should be released from any portion of the rent-charge. So the same result would be where the release of part of the land from the rent-charge takes place with the concurrence of all who may then be the owners of that portion of the land which is unreleased. The latter part of s. 10 preserves the rights of such persons where they do not concur. The learned judge who tried this action was of opinion that as the defendant did not concur in the release to Wright, his rights were such as they would have been if the Act of 22 & 23 Vict. c. 35, had never been passed, and that therefore the defendant's land was discharged altogether of the rent-charge. In my opinion he was wrong. The section does not say the rights of the persons interested shall be the same as they would have been if the Act had not been passed, but that they shall not be prejudiced, and it means that such rights as they had which were not inconsistent with the earlier part of the section shall be preserved. It was argued for the plaintiff that it only saved the right to contribution which the owner of the part of the land which was not released had against the owner of the other part of the land which had been originally charged with the annuity, that is very much the same as saying that the rights shall be the same as if the Act had not been passed, and is not, I think, the true construction of the section. I think I can conceive what the section really means. The right to contribution was because the law meant that each part of the land should not bear more than its proportion of an annuity with which the whole land was charged. In the present case the annuitant joined in releasing one part of the land from her annuity, then the owner of that part which was not released ought not to be liable for more than such proportion of the annuity as corresponded with his portion of the land. Before any part of the land was released he was liable to pay the entire annuity, and if he did so, he had a right to contribution against the owner of the other part of the land. It is that right one must look to in construing this section, and we ought, I think, to so construe it as to say that the portion of land unreleased is liable, but only for its proportion of the annuity.

LINDLEY, L.J. I am of the same opinion. The section is rather obscure, but the first thing to do is to see what is the object of the whole of it. It was evidently intended to put an end to the old law by which if one released part of the land from the annuity charged on it the whole annuity was gone. It was not thought desirable that the enactment should say, nor does it, that in all cases in which a part of the land is released the annuity shall be apportioned, because when the owner of a large estate subject to a rent-charge cuts up his land into parcels, it is not wished often to apportion the rent-charge, but rather that the whole of it should be thrown on some particular part. It was intended, I think, to distinguish between the effect of a release of part of the land where the persons interested in the other part concur, and where they do not concur. In the former case the annuity would not be apportioned, but would be payable entirely out of the unreleased part, but in the latter case the unreleased part ought to be liable only to a proportionate part of the annuity, otherwise the result would be that either the whole of the land would be released contrary to the enactment, or else there would be a right to contribution involving circuity of action. This is all avoided, and a reasonable result is produced by construing the latter part of this section with reference to the first in the way we have now done. The judgment will be reversed, and will be for the plaintiff for a proportionate part of her annuity.

Judgment reversed.

Solicitors for plaintiff: *Tippetts & Son.*

Solicitors for defendant: *Tamplin, Tayler, & Joseph.*

W. P.

THE QUEEN *v.* RAWLINS.
THE QUEEN *v.* DIBBIN.

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Dec. 5.

Poor-rate—Salary derived from Poor-rate—Disqualification of Guardian—5 & 6 *Vict. c.* 57, s. 14—*Clerk of Highway Board—Clerk of School Board—Payment out of Funds raised in a Poor-rate*—27 & 28 *Vict. c.* 101, *s.* 32; 33 & 34 *Vict. c.* 75.

The Act 5 & 6 Vict. c. 57, s. 14, which enacts that "no person receiving any fixed salary . . . from the poor-rates in any parish or union shall be capable of serving as a guardian in such parish or union" does not apply to the clerk of a highway board or of a school board whose salary is paid out of the highway or school board fund collected as a poor-rate by the overseers in pursuance of precepts issued to them under the Highway Act, 1864, 27 & 28 Vict. c. 101, or the Elementary Education Act, 1870, 33 & 34 Vict. c. 75, respectively.

Rule calling on the defendant Rawlins to shew cause why an information in the nature of a quo warranto should not be exhibited against him to shew by what authority he claimed to exercise the office of a guardian of the poor of the parish of Wimborne Minster in the Wimborne and Cranborne Union, on the ground that he received a fixed salary from the poor-rates of the union. The affidavit on which the rule nisi was granted stated that Rawlins had been elected and had acted as a guardian of the poor of the said union; that he was clerk to the Wimborne Highway District Board, which included several parishes in the union, at the annual salary of £50 paid out of moneys raised from the poor-rate for the several parishes in the Wimborne highway district; that the rates required for the purposes of the Wimborne highway board were raised by a precept from the waywardens of the board to the overseers of the poor of the several parishes within the highway district, except the parish of Wimborne Minster, to provide out of the poor-rate to be levied for the parish the amount of the highway precept; and 5 & 6 Vict. c. 57 s. 14 was cited. (1)

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(1) 5 & 6 Vict. c. 57, s. 14, reciting 4 & 5 Wm. 4, c. 76, enacts that no person during the time for which he may serve or hold the office of assistant overseer of any parish, nor any paid officer engaged in the administration of the laws for the relief of the poor . . . under the provisions of the said first recited Act, shall be capable of serving as a guardian; and no person receiving any fixed salary or emolument from the poor-rates in any parish or union shall be capable of serving as a guardian in such parish or union.

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By the affidavit of Rawlins in answer he stated that his salary as clerk to the Wimborne Highway District Board was charged to a highway fund contributed by and charged upon the several highway parishes within such district in proportion to the rateable value of the property in each parish as directed by 27 & 28 Vict. c. 101, s. 32; that s. 33 provided for the issuing of precepts by the highway board to the overseers empowering them to levy a poor-rate out of which they were required to pay the highway rate; that this was done; that his salary as clerk was paid out of the district fund of such highway board raised as aforesaid and not out of the poor-rate; that the board of guardians and the highway board were distinct bodies, and the guardians as such had no voice in any matter pertaining to the highway board.

Bosanquet, Q.C., and *Claude C. M. Plumptre*, shewed cause. The fund out of which the defendant's salary is paid is a highway rate and not a poor-rate although collected as a poor-rate by the overseers of the poor. He is not within the scope of 5 & 6 Vict. c. 57, s. 14. Moreover in this particular parish the precept is directed to waywardens, who levy a highway rate, and not to the overseers to levy a poor-rate.

Gore, in support of the rule. By the Highway Act, of 1864 (27 & 28 Vict. c. 101), ss. 32, 33, the salary is payable out of a fund raised by precepts issued to the overseers who must "pay the sum required out of a poor-rate to be levied by them." Out of the fund so raised the salary of the clerk is paid. It is therefore paid out of the poor-rate, and he being a person receiving "a fixed salary from the poor-rates in the union" is by the express terms of 5 & 6 Vict. c. 57, s. 14, rendered incapable of serving as a guardian.

MATHEW, J. I am clearly of opinion that the rule should be discharged.

I construe the words of 5 & 6 Vict. c. 57, s. 14, "no person receiving any fixed salary or emolument from the poor-rates in any parish or union" to mean "from any rates devoted to the relief of the poor." The object of the enactment was that persons under contracts with the parish should have nothing to do with the administration of the funds collected for the relief of the poor.

By 27 & 28 Vict. c. 101, and other Acts of the same character different rates for some purposes are thrown on to the poor-rate for the convenience of collection. Lighting, and school board and a number of other rates are so dealt with. But when the money raised in pursuance of a precept from the waywardens is received and used it is stamped from the time of its collection as devoted to the payment of expenses incidental to the maintenance of the highway, and becomes in point of fact a highway rate, and is not within the terms or meaning of 5 & 6 Vict. c. 57, s. 14, or the mischief against which the enactment is directed.

Day, J., concurred.

Rule discharged with costs.

REG. *v.* DIBBIN.

The Queen v. Dibbin.

A similar question was raised with respect to the clerk to the school board for the district, whose salary was paid out of the local rate raised in pursuance of 33 & 34 Vict. c. 75, s. 54, Elementary Education Act, 1870, by the overseers of the poor.

Bosanquet, Q.C., and *Claude C. M. Plumptre*, appeared to shew cause, but

Gore, for the relator, admitted that the point raised was decided by the judgment in *Reg* v. *Rawlins*, and

Rule discharged with costs.

Solicitors for relator: *Roberts & Barlow.*

Solicitors for defendants: *Lovell, Son, & Pitfield.*

J. R.

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GLEN, Appellant; THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF FULHAM, Respondents.

Metropolis Local Management Acts—Metropolis—Order of Board to Overseers to levy Rate—Sealing—Issue of Order—18 & 19 *Vict. c.* 120, *ss.* 158–161.

By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 158, every vestry and district board shall from time to time "by order under their seal require" the overseers of their parish to levy the sums which such vestry or board may require for defraying the expenses of the execution of the Act.

By s. 161 the overseers "to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof":—

Held (per Stephen and Mathew, JJ., Day, J., dissenting), that such an order became effective when sealed, and service of it on the overseers was not necessary to authorize them to levy rates, but that rates made by overseers in pursuance of such order, after notice of it having been sealed, were valid.

Case stated under 12 & 13 Vict. c 45.

The appellant was the occupier of a house and premises in the parish of Fulham, Middlesex, and was a member of the Fulham District Board of Works.

The respondents were the overseers of Fulham. The parish is within the district of the Fulham District Board of Works. On the 17th of March, 1884, the clerk to the said district board wrote to the vestry clerk of Fulham:—

"In answer to your letter, dated this day, I beg to inform you that the amount of the Metropolitan Board's precept is made up as follows.

Main drainage	£1390	18	4
Fire brigade	772	13	6
Bridge expenses	752	8	0
General improvements	2084	3	4
For all other purposes of the board . .	1434	7	1
	£6434	10	3"

On the 9th of April, 1884, the Fulham District Board of Works, acting pursuant to 18 & 19 Vict. c. 120, ss. 158, 174, affixed their seal to certain orders or precepts addressed to the overseers of the several parishes in their district requiring such overseers to levy and pay over to the treasurer of such district board the sums therein respectively mentioned at or before the dates therein mentioned.

Four such orders or precepts purported to be addressed to the overseers of Fulham requiring them to levy the sums hereinafter mentioned for general rate, lighting rate, and sewers rate, and metropolitan consolidated rate respectively.

On the same 9th of April, 1884, the clerk to the Fulham District Board of Works by direction of the board wrote to the vestry clerk of Fulham:—

"I am directed to inform the parish officers of Fulham that the board have sealed precepts which are now ready to be issued for raising the following sums, viz.:—

General rate	£25,140	16	11
Lighting rate	3070	15	5
Local sewers rate	4280	17	6
	£32,492	9	10

"But before issuing the precepts I am instructed to ask the parish officers to furnish the board with a duly audited statement, and to pay over to the board the amounts collected in excess of the last year's precepts."

The audited statement and the excess referred to in the said letter were the audited statement and excess required to be handed over by the overseers to the district board in pursuance of s. 161 of the Metropolis Management Act, 1855, and s. 14 of the Metropolis Management Act, 1862.

The amount of the said excess was duly paid to the said district board, to wit the sum of 753*l.* 6*s.* 11*d.*, on the 3rd, and the sum of 10*l.* on the 15th days of May, 1884, and the said audited statement was duly delivered to such board on the 15th day of May, aforesaid, in pursuance of the said Acts.

The precepts so sealed as aforesaid were retained by the said district board and were not in fact served upon the said overseers until the 15th of May, 1884.

Before the precepts were served as aforesaid, to wit on the 19th of April, the overseers of the parish signed three several rates or assessments intituled respectively "a lighting rate, at and after the rate of 1*d.* in the pound," "a general rate at and after the rate of 1*s.* 1*d.* in the pound," and "a sewers rate and a metropolitan consolidated rate, at and after the rate of 6*d.* in the pound;" and the said rates or assessments were allowed by two justices of the county of Middlesex on the same 19th of April, 1884. In each of the said rates the appellant was assessed as occupier of his house and premises aforesaid.

Notice of appeal against the rates to the quarter sessions was given by the appellant on the grounds (1) that the rates were made by the churchwardens and overseers without lawful authority; (2) that such rates were not made for the purpose of levying the amounts of any orders or order of the Fulham District Board of Works issued to the churchwardens and overseers; and (3) that whereas the orders of the board in respect of which such rates were respectively made were not issued to the churchwardens and overseers until the 15th of May last, the rates had been made on the 19th of April last, and notice that such orders would not be issued until certain conditions had been complied with (which conditions were not complied with when the rates were made) was given to the churchwardens and overseers before they made the rates. The question for the opinion of the Court was whether, under the circumstances aforesaid the rates were good and valid rates. If so the appeal was to be dismissed.

Macmorran, for the appellant. The rates were bad. No valid precept had been "issued" to the overseers within 18 & 19 Vict. c. 120, ss. 158, 161. An order under seal must be "issued," and not a mere notice given that a precept is sealed but will not be delivered until the excess raised by the former rate is paid over. Ample power is given to compel payment over of such excess by proceedings against the overseers for penalties under 25 & 26 Vict. c. 102, s. 14. These precepts might have been withdrawn.

Tickell (*Besley* with him), for the respondents. The precepts were issued when sealed.

Sect. 158 enacts only that the board shall "by order under their seal require" the overseers to levy a rate. Such orders under seal were made and they require the overseers to levy a rate. Nothing in the Act prescribes that the precept shall be served on the overseers. Even if not issued when sealed, the precepts were certainly "issued" when notice was given to the overseers. They have acted on the precepts, and great inconvenience and hardship would follow if the rates were held to be invalid.

DAY, J. I differ from my learned Brothers, and I regret it for more than one reason. I mistrust my own opinion when it is at variance with theirs, but I have a strong opinion and must express it. I quite appreciate the inconvenience of holding these rates to be invalid, but I am not pressed by the argument ab inconvenienti, for the Act must be construed according to its plain language, and irrespective of the consequences, for which we are not responsible. By 18 & 19 Vict. c. 120, the board shall by order under their seal require the overseers to levy a rate. The powers to make a rate are in s. 161, which provides that "the overseers of the poor of every parish to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof." Had "any such order as aforesaid" been "issued" in the present case? I am of opinion that no such order had been "issued" at all. True the precepts had been sealed by the board, but as far as I can understand it the board had carefully and designedly abstained from issuing them, and it was not unreasonable that the board should so abstain. They might have thought that the excess in the hands of the officers was so trifling that it would not affect the precepts, and might have therefore "issued" them. On the other hand they might have thought the excess in the hands of the officers so large that it would affect the amount for which the precepts should be made; and it seems to me that, not having issued these precepts, they might well issue others, and that would be an exceedingly reasonable and fair course under certain circumstances. Suppose the excess had been 10,000*l.*, in common fairness to the parish it would have been, in my opinion, right to have only sealed and issued a precept for a sum minus that 10,000*l.*, ex gr. for 20,000*l.* instead of 30,000*l.*; so that it would be convenient not to issue the precept until the excess in the hands of the officers was paid over. It appears to me that the authority to levy the rate was when the precepts were "issued." Here they were not issued. The board say "The precepts are sealed and ready, but until the excess is paid over we will refrain from issuing them." Take the case of a deed sealed but not delivered. The delivery is postponed until some condition shall be fulfilled. There is a wide difference between sealing and delivering a deed, and so also between sealing and delivering a precept. I think that here although the contents were in some sense communicated to the overseers they were at the same time told that the precepts were not issued, the object being to put the overseers on their guard and to induce them to refrain from signing that rate until the precepts were *issued*. Any other construction would lead to great inconvenience. It would be inconvenient to hold overseers bound to levy a rate before the precept is in their hands, for without it they would have no justification for levying the rate. They are not, I think, bound until the precept is not only sealed but communicated to them by issuing it, and it is not "issued" by writing a letter saying that it will *not* be issued until a certain time. The issuing and placing it in their hands is their *warrant*. I think the rates bad, and that the objection to them must prevail.

MATHEW, J. After hearing the judgment of my Brother Day I cannot say that this case is free from difficulty, but I remain of opinion that these rates are valid. The question comes to this: Was it intended by the Act that service of the precept on the parish officers should be a condition precedent or not? I find nothing in the Act to render the issue of the precept essential to the validity of the rate. Sect. 158 enacts that every vestry and district board shall from time to time "by order under their seal require the overseers of their parish . . . to levy and to pay over to the treasurer of such vestry or board . . . the sums which such vestry . . . may require for defraying the expenses of the execution of this Act. . . ." Under that section precepts were sealed (1) one of which requires the overseer to assess and levy within his parish and raise the sum therein specified, and to pay over to the treasurer of the board the said sum in the manner therein prescribed by instalments pursuant to a precept on the board from the Metropolitan Board of Works, &c. The district board having themselves been ordered to provide funds, transfer under this precept that liability to the parish of Fulham. There is another precept or order to levy a general rate for 25,140*l.* 16*s.* 11*d.* And another in like form. Under these precepts the parish officers made rates to obey the directions given by the board of works for the Fulham district as contained in these precepts. But it appeared that on the date when these precepts were so formally and solemnly executed in the terms of the Act, there was a difficulty between the parish officers and the board of works. The parish officers it was said had in their hands sums of money which in accordance with this and later Acts they ought to have accounted for to the board of works, and, after the precepts had been sealed, the clerk informed the parish officers that the board had sealed the precepts, but the letter goes on to say, "before issuing the precepts I am instructed to ask the parish officers to furnish the board with a duly audited statement, and to pay over to the board the amounts collected in excess of the last year's precepts." The parish officers appear not to have complied at once with the request to send in a statement and pay over the excess, but they proceeded to act on the precepts and made rates.

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(1) They were produced to the Court.

It appears to me that, in the terms of s. 158, authority had been given to them to do so. But it is said that by a later section in the Act they had *not* authority unless the precepts had been "issued." Sect. 161 enacts that "the overseers of the poor of every parish to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof."

The appellant contends that s. 161 imposes a condition precedent that the order should be "issued." I do not so interpret the Act. I think that was not intended to impose a condition that there should be a personal service of the order. I feel the difficulty pointed out by my Brother Day of saying what the Act meant, but I cannot suppose that it meant that a precept should be held back so as to impose a condition which the board had no power to impose. They had no power to do it, for otherwise they would have power to postpone the rate and so cast the liability on a different body of parishioners. The appeal should be dismissed.

STEPHEN, J. I agree with my Brother Mathew. The question lies in a narrow compass. Sect. 158 enacts that the board shall by order under their seal require the overseers to levy and pay over the sums which such board may require, and by s. 161 the overseers to whom any such order as aforesaid is issued, shall levy the amount mentioned therein.

The words differ in the two sections, but are they two expressions of the same thing or expressions of two different things? As I read it, the *issuing* of an order means and is exactly the same as *making* an order under their seal. The issuing is not sending the order by the clerk to the overseers, but it is issuing it out of their own minds by their own hands, and putting the seal on a piece of paper. Serving the order is one thing, and issuing the order is another.

Suppose the fact of sealing the order is brought in any way to the notice of the overseers, that is as good as service, and although it might be an answer to proceedings against the overseers for them to say that they had no notice of it, yet the time of issuing the precept seems to me to be the time of sealing it. My inclination would be to support the rate, and the interpretation I put on the Act seems to me the more convenient interpretation, and my Brother Day seems to admit that it would be very convenient, although he does not think it the true one. When I find my interpretation is the more convenient, it strengthens my opinion that my interpretation is the true one. I may also observe, looking at the inconvenience on the other side, that I understand and follow what Day, J., says as to the importance of withholding the precept until the excess is in the hands of the board. But in the view taken by my Brother Mathew and me the board have the remedy in their hands. If instead of writing a letter stating that they had sealed, but should not issue the order, they had said they had prepared it, but should not *seal* it until a certain day, that would be acting within their powers. Besides that, they have stringent powers against the overseers personally.

Appeal dismissed.

Solicitors for appellant: *Green & Hartcup.*
Solicitor for respondents: *John Haines.* J. R.

1884
Dec. 16.

FELLOWS AND OTHERS *v.* THORNTON.
YOUNG, GARNISHEE.

Practice—Attachment of Debts—Judgment—Lapse of Six Years since—Garnishee Order to pay—Order XLII., rr. 6, 8, 22, 23—*Order XLV., r.* 1.

A garnishee against whom proceedings under Order XLV. have been duly taken, may be ordered to pay to a judgment creditor a debt due from such garnishee to the judgment debtor, although more than six years have elapsed since the judgment.

MOTION to set aside an order of Pollock, B., at chambers, and that it might be ordered that the garnishee should forthwith pay to the judgment creditors the sum of 13*l.* 8*s.* 2*d.* then in his hands, and any sum or sums of money then or thereafter to come into his hands as trustee under a certain ante-nuptial settlement [described] or so much thereof as might be sufficient to satisfy the judgment debt and interest.

On the 10th of August, 1876, the judgment creditors recovered judgment against Thornton, the judgment debtor, for 374*l.* 3*s.* 10*d.* On the 22nd of October, 1884, an order was made by a district registrar that all debts owing or accruing from the garnishee to the judgment debtor should be attached to answer the judgment, 310*l.* 14*s.* 10*d.* being still due on the judgment, together with the sum of 99*l.* 4*s.* for interest. On the 26th of November, 1884, the parties, together with the garnishee, by their respective solicitors, appeared before the registrar, and the garnishee admitted that the sum of 13*l.* 8*s.* 2*d.* was in the hands of his bankers, and the registrar, after hearing the solicitors, and affidavits, and the admission aforesaid, made an order that the garnishee should forthwith pay to the judgment creditors the sum of 13*l.* 8*s.* 2*d.* then in his hands, or any sum or sums then or thereafter to come into his hands as trustee under a certain ante-nuptial settlement [described], or so much thereof as might be sufficient to satisfy the judgment debt and interest, and that in default execution might issue for the same.

On appeal this order was set aside by Pollock, B., at chambers.

Stanger, in support of the motion, contended that the order of the registrar was right, and should stand, at least as to the amount actually in the hands of the trustee, for, although more than six years had elapsed since the judgment, Order XLII., r. 23, and Order XLV., r. 1, empowered the Court or a judge to allow an attachment of the debt, and make the order on the garnishee to pay it.

Man, shewed cause. The attachment is equivalent to execution: Order XLII., r. 8; but has issued on an expired judgment. Proceedings should have been taken to revive the judgment. Notice should have been given to the garnishee before the attachment order was made: Order XLIV., r. 2.

Secondly. The order to pay over the whole fund is clearly wrong; the dividend actually received by the trustee is all that can be attached, if any. The future dividends cannot be attached until they are in his hands.

LORD COLERIDGE, C.J. The order of the registrar is right so far as regards 13*l.* 8*s.* 2*d.* Such an order cannot be made to attach future debts. But the 13*l.* 8*s.* 2*d.* is in the trustee's hands, and can be attached if proper process is used. This is a debt owing to the judgment debtor, and the judgment against him is eight years old, so that no execution, without leave, could issue on the judgment, because more than six years have elapsed. "Where six years have elapsed since the judgment or date of the order . . . the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly": Order XLII., r. 23. "In these rules the term 'writ of execution' shall include writs of fieri facias, capias, elegit, sequestration, and attachment, and all subsequent writs that may issue for giving effect thereto. And the term 'issuing execution against any party' shall mean the issuing of any such process against his person or property as under the preceding rules of this order shall be applicable to the case": rule 8. In my opinion, on the strict construction of those words, they do not include what is ordinarily called attachment of debts, but are confined, by Order XLIV., to writs of attachment attaching a person for non-compliance with an order of the Court, for contempt, for offences against the discipline of the Courts, and other like cases. Such a writ cannot be issued without the leave of the Court, to be applied for on notice given to the party: Order XLIV., r. 2; which shews that it is a personal process against the individual. It is, perhaps, unfortunate that the word "attachment" has been used as to a debt. But the word "attachment" is the old legal phrase applicable to a debt in the hands of a garnishee. "Attachment of debts" in Order XLV. is, however, plainly different from attachment of the person. Order XLV. prescribes that the Court or a judge may, upon an ex parte application of any person who has obtained a judgment or order for the recovery or payment of money . . . order that all debts owing or accruing from the garnishee to such debtor shall be attached to answer the judgment or order; "and . . . it may be ordered that the garnishee shall appear before the Court or a judge . . . to shew cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor . . .": rule 1. In that order, which relates to attachment of *debts* in the hands of debtors, there is not a word about six years having elapsed since judgment. When a judgment has been obtained and is not satisfied, the garnishee may be required to shew cause why he should not pay the money to the judgment creditor. No doubt the garnishee may, on shewing cause, urge before the judge that a long time has elapsed since the judgment, and any other defence, but when he has done so, if the judge is satisfied that there is no good reason why the order should not issue, it may be made. I think Order XLV. for attachment of debts stands by itself, and that rules 8, 22, and 23 of Order XLII. have application to Order XLIV., and not to Order XLV. The order limited to the sum already in the hands of the garnishee ought to stand.

STEPHEN, J. I am of the same opinion, but do not quite agree with my Lord in his view of the rules.

By Order XLII., r. 6, "a judgment for the recovery of any property other than land or money may be enforced . . . (b) by writ of attachment." I think the word "property" comprises a debt, and that "by writ of attachment" includes attachment of the person, and also includes attachment of a debt. It is a well-known phrase, and the very title of Order XLV. is "Attachment of Debts." I think Order XLII. establishes this; judgment may be enforced "by writ of attachment" such as is mentioned in Order XLV. "In these rules the term 'writ of attachment' shall include writs of fieri facias, capias, elegit, sequestration, and attachment, and all subsequent writs": Order XLII., r. 8; and I think that in that rule also "attachment" includes attachment of debts. Then, by rule 22, "As between the original parties to a judgment or order execution may issue at any time within six years from the recovery of the judgment or the date of the order," and attachment of debts appears to me to be a form of "execution." By rule 23, where six years have elapsed since the judgment the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. Under Order XLV., which applies specially and in minute detail to attachment of debts, the Court or a judge may upon ex parte application order that all debts owing from the garnishee shall be attached, and the garnishee may be required to appear before the Court or a judge to shew cause why he should not pay. Here such order was made and notice was issued, and the creditor to whom the debt was due, the original judgment-debtor, came forward and said the judgment was more than six years old. The registrar did not think fit to give effect to that objection, and, being satisfied that the party applying was entitled to issue execution, made an order to that effect, and in so doing was, I think, exactly within Order XLII., r. 23. So the whole proceeding was within the rules taken together, although I give a somewhat more general meaning to the word "attachment" than my Lord gave. There is some little difficulty about the use of the word. The primary and ordinary meaning of the word "attachment" is attaching the person and putting him into prison. But when attachment of a debt is ordered, we say to the man from whom the money is owing "pay that debt to some one else, or we shall attach *you* and send you to prison." No doubt the garnishee might be attached for not paying the debt after the garnishee order. I speak, of course, with the utmost deference to my Lord, whose acquaintance with the true meaning of these rules is much greater than that of any other person who was not concerned in drawing them. The result of my judgment is, however, the same, this debt must be paid to the creditors.

Order of Registrar to stand as to the sum of 13l. 8s. 2d.

Solicitors for plaintiffs: *Wilkins & Fanshaw.*
Solicitors for defendant: *Andrew, Wood, & Co.*
Solicitors for garnishee: *Torr & Co.*

J. R.

Dec. 18.

[IN THE COURT OF APPEAL.]

WELDON *v.* DE BATHE.

Husband and Wife—Married Women's Property Acts, 1870 *and* 1882 (33 & 34 *Vict. c.* 93, *and* 45 & 46 *Vict. c.* 75)*—House in sole occupation of Wife as her Separate Property—Trespass for entering—Right of Wife to sue.*

A married woman in the sole occupation of a house, bought by her out of her own earnings, since the Married Women's Property Act, 1870, can now, after the Married Women's Property Act, 1882, sue alone, without her husband, in an action for trespass, a person who has entered such house against her will, though he did no injury to the house and entered it with the authority of her husband, but for a purpose unconnected with the husband's desire to live with his wife.

Query, if the husband has himself a right to enter such house.

STATEMENT OF CLAIM. 1 and 2. The plaintiff was for many years residing at Tavistock House, Tavistock Square, and on the 14th of April, 1878, while she was in sole possession of the said house, the defendant, in collusion with plaintiff's husband, William Henry Weldon, one L. S. Winslow, J. M. Winn, E. H. Rudderforth, C. E. A. Semple, and J. Neal wrongfully entered the house and remained therein some ten minutes, and thereby caused the plaintiff considerable disgrace, trouble, and annoyance.

There was also a claim for slander, and other claims which it is now unnecessary to refer to.

Defence: 1. The plaintiff was the wife of the said William Henry Weldon, who was still living. Objection: That as the supposed grievances complained of were committed before the passing of the Married Women's Property Act, 1882, the right to any damages in respect thereof was vested in the said W. H. Weldon, and that the plaintiff therefore was not entitled to sue for them or recover in this action.

3. The house in the claim mentioned was not in the plaintiff's possession.

4. The house at the time referred to in the claim was the house of the plaintiff's said husband, and was in his possession and the defendant, as such husband's servant and by his command, did what was complained of in the 2nd paragraph of the claim.

Reply: 2. That the house in the 2nd paragraph of the claim mentioned had been in the plaintiff's sole possession for three years, and was bought and paid for out of money earned by her in her profession of a musical composer and singer in the year 1871.

Rejoinder—Objection: That the facts stated in the 2nd paragraph of her reply were wholly immaterial, and afforded no answer to the 4th paragraph of the defence.

The Divisional Court (Mathew and Day, JJ.) gave judgment for the defendant on the points of law above raised, and ordered the claims for trespass and slander to be struck out of the statement of claim.

The plaintiff appealed.

The plaintiff appeared in person.

J. Digby (*Sir H. Giffard, Q.C.*, with him), for the defendant. There has been no separation in law between the plaintiff and her husband, and consequently the house is to be deemed in the possession of the husband—the possession by the wife being the possession of the husband. The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), repeals the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), but such repeal is by s. 22 not to affect any right acquired while such repealed Act was in force, or the right or liability of a husband married before the commencement of the Act of 1882 to sue or be sued. Then, though by s. 1 of the Act of 1870 the investment of a married woman's earnings is to be "deemed and taken to be property held and settled to her separate use," it does not enable the property to be hers as if she were unmarried: *Hancocks* v. *La-*

blache (1) and *Howard* v. *Bank of England* (2); nor does that enactment give her the legal estate in the property, but such legal estate is in the husband, who, in the absence of any other trustee, would be trustee for her. He would have a right to go himself to the house which was so settled to the separate use of his wife, according to the opinion of Cotton, L.J., in *Symonds* v. *Hallett.* (3) It is true that in that case the Court of Appeal held that the wife was entitled to an interim injunction to restrain her husband from entering her house, but there the husband claimed a right to go and use the house as his own property, and it was therefore for the purpose of protecting the property that the Court there interfered. It is admitted that if the house in the present case had been injured qua property by what the defendant did, the plaintiff, under the Married Women's Property Act, 1882, would have a right of action; but there was no injury done here to the property, and as the husband had himself a right to enter the house, so he could authorize the defendant to go there for the purpose for which he went. *Weldon* v. *Winslow* (4) is an authority, no doubt, that a married woman can sue for a tort committed before the Married Women's Property Act, 1882, came into operation, but she is here suing for what was done by the authority of her husband under rights acquired by the Married Women's Property Act, 1870.

Cur. adv. vult.

Dec. 18. BRETT, M.R. In this case the plaintiff sues for several alleged causes of action. One is for slander and, inter alia, another is for trespass in entering against her will a house of which she had the possession. An objection was taken in the nature of a demurrer to these two causes of action. [His Lordship here gave his reasons why the plaintiff had no cause of action in respect of the claim for slander, as the words spoken were not per se actionable, and the special damage alleged was not the natural or reasonable result of the words.] Then as regards the claim for trespass. The question is, whether the plaintiff can have that remedy. She is a married woman, and it is alleged that the defendant entered her house by the authority of her husband, and upon that it was said the house was the legal property of the husband, and that he has a right of entry into his wife's house whether she wishes it or not, and that therefore he can authorize other people to go there. The question which is thus raised is one of vast importance, and is not confined to the present case, because, if the arguments against the plaintiff ought to prevail, it seems to me the Acts of Parliament which have been passed for the sole purpose of protecting married women will be frittered away, and will afford no protection at all.

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(1) 3 C. P. D. 197, and per Lindley, L.J., at p. 201.

(2) Law Rep. 19 Eq. 295, and per Jessel, M.R., at p. 301.

(3) 24 Ch. D. 346, at p. 351.

(4) 13 Q. B. D. 784.

Now by the Married Women's Property Act, 1870, money earned by a woman's own individual exertions and skill is to be considered as her own money and as if it were settled to her own separate use; and property bought with that money is to be her property as against her husband as if it were settled to her separate use.

It is admitted on these pleadings that the house which was occupied by the plaintiff was bought by her with money which was the result of her own earnings, so that it was within the meaning of that Act of Parliament her separate property as against her husband, as if it had been settled to her separate use. I doubt myself very much whether under that Act of Parliament she has only the same rights as a married woman would have had formerly, where property was settled to her separate use. I think that she would have something more. But if she had only such rights, and was in the sole occupation of the house and her husband was not present, I have myself no doubt but that she could maintain, even under the Married Women's Property Act, 1870, trespass against a mere stranger. But the Married Women's Property Act, 1882, seems to me to have given married women greater protection and greater powers, and amongst them the right to maintain an action without joining her husband with her. In *Weldon* v. *Winslow* (1) we held that according to the true construction of that Act a married woman has not merely the right to protect herself against acts of aggression committed since 1882, but has also the right to bring an action in respect of an infringement of rights given her by the Act of 1870 which had occurred before 1882. Therefore it seems to me, unless there is

(1) 13 Q. B. D. 784.

something to prevent it, she has the right to protect herself by this action of trespass.

Now what is alleged to prevent her. It is said that the defendant entered the house by the authority of her husband. A question has been raised whether the husband himself can, under circumstances like these, enter his wife's house, and it has been urged that he can by virtue of his marital rights. I give no opinion on that point whatever, but I feel clear, however, that even assuming the husband can enter as against his wife's will on such property by reason of his marital right, he cannot delegate that right to anybody else. It would be frittering away the Married Women's Property Acts, and would be doing away with the whole protection which was intended to be given to married women, if the husband could authorize other people to enter the house, not only for the purpose of assisting him to go into the house, but for other and different purposes. If an ill-conducted husband were to desert his wife, and she by her own exertions were able to live respectably in a house of her own with her children whom she was supporting, it would be dreadful to suppose that notwithstanding these Acts of Parliament the husband could not only go into that house himself, but that he could take in or send there his degraded companions against the will of his wife. I do not for a moment suggest that the present case is at all like that, but it shews the result to which the argument on behalf of the defendant would necessarily lead if such argument could be maintained successfully. I am therefore of opinion that, assuming on these pleadings this house to be the product of money which was earned by the plaintiff by her own exertions, her husband could not authorize the defendant to enter it in the way he did, and that although the defendant did no injury to the house at all, he committed a trespass for which an action will lie; consequently the judgment of the Divisional Court which ordered that cause of action to be struck out was, I think, wrong.

COTTON, L.J. There were two points determined by the Divisional Court. As regards the first, I do not think it necessary to add anything to what the Master of the Rolls has said, especially as we agree with the decision thereon of the Court below.

But the second point is not only new, but most important. It involves two questions. The first is, can the plaintiff alone without her husband maintain this action, and if she can, is there a defence to such an action on the pleadings in this case?

Now in my opinion she can alone maintain the action. The house in which the trespass was committed was one which on the statement in the pleadings was bought with the proceeds of her own earnings, and by the 1st section of the Married Women's Property Act, 1870, is to be treated as if it were her separate property settled to her separate use. In my opinion she under that section of the Act as regards such property stands exactly in the same position as if it had been settled on her by her husband by an effectual deed: subject of course to this, that under the Act the legal estate is in the husband. With respect to the question whether the plaintiff can sue alone, whatever doubts I might have had as to this under the Act of 1870, I am of opinion that the 12th section of the Married Women's Property Act, 1882, gives her power to bring an action for the alleged wrongful entry of the house which is her separate property, because it is in these terms: "Every woman whether married before or after this Act shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject as regards her husband to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole." It is essential for the protection of her separate property that she should be able to have a remedy for the intrusion into her house, which is her separate property, of a person whom we must consider as a stranger entering against her will.

It has already been decided by this Court that s. 1, sub-s. 2, of the Act of 1882 enables an action to be brought in respect of a wrong committed before the Act of 1882 came into operation (1), still, of course, the question whether the act itself was wrongful must depend on the law as it existed at the time the Act of 1870 was alone in force; and, without considering whether there is any difference in this respect between the Act of 1870 and the Act of 1882, as it is unnecessary to do so, it is sufficient to say that at

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(1) *Weldon* v. *Winslow*, 13 Q. B. D. 784.

1884

WELDON v. DE BATHE.

Cotton, L.J.

that time her position was this, that the house was her separate property; that is to say, her husband had no right to interfere with the property in the house. It is not necessary to decide the point decided by the Divisional Court as to the right of the husband to enter the house, notwithstanding that it is her separate property, still I in no way differ from the view taken thereon by the judges in the Divisional Court, nor do I qualify the opinion I expressed on the subject in the case of *Symonds* v. *Hallett.* (1) Assuming, however, that the husband had a right to go to this house for the purpose of living there as the husband of the plaintiff, would that right enable the defendant to go there by the husband's command, if he did so against the will of the plaintiff? It might be a very different question if the husband were at the time living in a house which was properly settled to the wife's separate use, and I give no opinion as to whether a person going there in a way incident to and connected with the husband living there, without doing any other act which could be called wrongful, would be considered a trespasser. In this case we must take it that the defendant went to the plaintiff's house by the husband's direction, but not to do anything incident to or connected with a desire of the husband to live there with his wife. He went for a different purpose, and that being so, in my opinion, assuming the Divisional Court were right on the point, that if the husband had gone himself into the house he could not have been liable to an action of trespass, yet, in my opinion, he cannot by virtue of that power authorize another person to go into the house as the defendant went, not for the purpose of assisting the husband's living in the house, but for an entirely different purpose, and against the will of the wife. Taking the statements in the pleadings to be proved, in my opinion the plaintiff has a right to bring her action in respect of this entry into her house.

LINDLEY, L.J. I am of the same opinion. As regards the slander, I propose to say nothing. The other question is one of considerable importance. The plaintiff says, in substance, that in 1878 she was solely in possession of a house which had been bought by her with her own earnings, and which under the

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(1) 24 Ch. D. 346.

Married Women's Property Act, 1870, was therefore to be deemed property settled to her separate use, and she says that in 1878 the defendant entered that house wrongfully, which I construe as meaning against her consent. Pausing there for a moment, let us see what her position as a married woman would be. Could she or not maintain an action of trespass in respect of such an entry without joining her husband? It appears to me to be now settled beyond controversy that she could. The decision of this Court in *Weldon* v. *Winslow* (1) has shewn that she could now maintain such an action in the absence of her husband, and further, that she could maintain such an action even in respect of a tort committed before the Married Women's Property Act, 1882, came into operation.

Now the defence is, that the defendant entered the plaintiff's house by the authority of her husband, and this must be taken in connection with the statement by the plaintiff in the pleadings that she was solely in possession of such house. It is to be observed that this case does not raise the question as to whether a married lady having a house settled to her separate use can keep her husband out of it; nor the question whether if he be living there he can invite anybody to come and see him. Therefore on such points I express no opinion. The question we have to consider is whether when a married woman is in possession of a house settled upon her for her separate use, and is not living with her husband, he can authorize somebody to enter the house without her consent. In my opinion the husband can give no such authority. The right of possession of the property to which she is entitled to her separate use is an exclusive right against her husband, and whatever his rights are he cannot authorize anybody to intrude on the possession of his wife's separate property. On that short ground it appears to me that this part of the statement of claim is not open to the objection which has been raised against it.

Judgment reversed.

Solicitors for defendant: *Maples, Teesdale, & Co.*

(1) 13 Q. B. D. 784.

W. P.

[IN THE COURT OF APPEAL.]

1885
Feb. 4.

CROFT *v.* THE LONDON AND COUNTY BANKING COMPANY.

Practice—Ejectment—Relief against Forfeiture—Non-payment of Rent—Relief after Trial—Disallowance of Costs to Plaintiff—Common Law Procedure Act, 1852 (15 *&* 16 *Vict. c.* 76), *s.* 210; *Common Law Procedure Act*, 1860 (23 *&* 24 *Vict. c.* 126), *s.* 1.

Where in an action of ejectment upon a forfeiture by non-payment of rent the plaintiff obtains judgment, but without costs, the defendant may obtain relief from the forfeiture under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1, without being required to pay the plaintiff any costs other than those of the summons for relief.

Appeal by the plaintiff against an order of the Divisional Court granting the defendants, after judgment in ejectment, relief against forfeiture for non-payment of rent, and allowing the plaintiff no costs.

At the trial of the ejectment before Stephen, J., it appeared that one Collingwood was lessee of the premises in question, three dwelling-houses at Harrow, and the plaintiff assignee of the reversion. In April, 1883, Collingwood was adjudged bankrupt, and the defendants afterwards took an assignment of the lease from Collingwood's trustee in bankruptcy. The plaintiff after the bankruptcy brought an ejectment and obtained judgment against Collingwood, but finding that he was not in possession of the premises at the time of action brought, commenced a second ejectment against the defendants for forfeiture by non-payment of rent and other breaches of covenant. The learned judge at the trial held that the only forfeiture proved was that by non-payment of rent, and inasmuch as the arrears of rent without costs had been offered to the plaintiff before action and paid into court, he directed judgment for the plaintiff without costs, and ordered him to pay the costs in respect of the breaches of the covenant which he had failed to prove. He further stayed execution to enable the defendants to apply to a judge at chambers for relief. A summons taken out accordingly was referred by Pollock, B., to the Divisional Court.

The Divisional Court (Lord Coleridge, C.J., and Stephen, J.), on the 18th of December, 1884, ordered that upon payment by the defendants to the plaintiff of the arrears of rent due to him the defendants should have relief from the forfeiture, and that no costs be allowed to the plaintiff. The plaintiff appealed.

Terrell, for the plaintiff. The defendants could only obtain relief upon paying the plaintiff his full costs. Relief after trial from forfeiture for non-payment of rent is regulated by the Common Law Procedure Act, 1852, s. 210, and the Common Law Procedure Act, 1860, s. 1. (1) The effect of these enactments is to limit the right of a Court of law or equity to grant relief except upon payment of the plaintiff's costs: Woodfall's Landlord and Tenant, 12th ed., 304; and the fact that the judge at the trial disallowed these costs is immaterial.

Finlay, Q.C., and *C. K. Francis*, for the defendants. The effect of s. 210 of the Common Law Procedure Act, 1852, is simply to require the defendant who obtains relief after trial to pay the plaintiff's costs "if any." Here none have been allowed, and the Court will not disturb the order of the judge at the trial which was made with reference to the merits of the case.

BRETT, M.R. In this action the plaintiff obtained judgment in ejectment against Collingwood, the original lessee, and finding that Collingwood was not in possession of the premises at the time of action brought, he commenced a second action of ejectment against the defendants. Before this action was brought the defendants offered to pay all arrears of rent due, and pleaded in the action that they had tendered the amount and paid it into court. The action was tried before Stephen, J., who directed judgment for the plaintiff, and we must therefore assume that the forfeiture by non-payment of rent was proved. Then the defendants apply for relief under s. 1 of the Common Law Procedure Act, 1860. Under the Common Law Procedure Act, 1860, the case must be looked at as if it had been heard in a Court of Equity, and I think the provision as to payment of costs in s. 210 of the Act of 1852 does not limit the discretion of the Court at the hearing of the application for relief. The application came on before the Divisional Court; the judges, after hearing the facts, decided that relief must be granted; and I can see nothing to prevent them from granting relief on fair and proper terms. They thought, and rightly, that as the ejectment had been brought after the defendants had offered to pay the rent the relief might be granted without costs to the plaintiff. I think, however, that provision ought to have been made for the costs of application, although this is a very small matter. The only costs to which the plaintiff is entitled are those of the summons in Chambers, and upon the defendants undertaking to pay these costs the order will be affirmed.

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(1) The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210, regulates the procedure in ejectment for non-payment of rent, and enacts that "in case the lessee or his assignee, or other person claiming or deriving under the lease, shall permit and suffer judgment to be recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, the lessee, his assignee, &c., shall be barred and foreclosed from all relief or remedy in law or equity."

By the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, s. 1, "in the case of any ejectment for a forfeiture brought for non-payment of rent, the Court or a judge shall have power, upon rule or summons, to give relief in a summary manner—up to and within the like time after execution executed, and subject to the same terms and conditions in all respects as to payment of rent, costs, and otherwise, as in the Court of Chancery."

By the Conveyancing and Law of Property Act, 1881, 44 & 45 Vict. c. 41, s. 14, sub-s. 8, it is enacted that the section shall not affect the law relating to forfeiture or relief in case of non-payment of rent.

COTTON, L.J. I am of the same opinion. The order is really made by the Queen's Bench Division in the exercise of its jurisdiction as a Court of Equity. There are two sections of the Common Law Procedure Act, 1852, to be considered, 210 and 211. The terms imposed on the defendant by s. 211 of that Act as to payment of rent and costs are conditions imposed by the Act, without compliance with which the common injunction to restrain an ejectment for non-payment of rent could not be granted or continued by a Court of Equity. The common injunction was an interlocutory proceeding, and in my opinion it was not intended by that section to limit the powers of such a Court with regard to the terms upon which relief might be granted at the hearing of the cause. Then the appellant relies upon s. 210. This it is said requires not only the rent but the costs of both actions to be paid. The first judgment must be taken to have been obtained against a defendant who had no estate in the property, and who was not in possession. The bank do not require relief against that judgment, and therefore are not required to pay the costs of that action. The second action proceeded to judgment, and the plaintiff was adjudged not to be entitled to costs. In my opinion, therefore, he has not under s. 210 any right to the costs of that action, and as the defendants before action offered to pay the rent, I think it was reasonable that they should obtain relief without payment of the costs of the second action.

LINDLEY, L.J. I am of the same opinion. This was an application for relief after judgment; and the question is upon what terms it ought to be granted. It appears that the defendants had offered to pay the rent in arrear, but had made no legal tender, otherwise judgment could not have been obtained. It is said that they ought only to have relief upon the terms of paying the costs of the action. The costs are of two actions. In the action against the defendants the plaintiff, owing to his conduct, was deprived of costs by the presiding judge. It is said that the defendants ought to pay these costs as a condition of obtaining relief from the judgment. But why should they pay costs of which the plaintiff has been deprived already? As to the costs of the first action, it was wrongly brought; the judgment was mere waste paper; and the defendants ought not to pay them. The only point is as to the costs of the summons for relief. Upon the defendants undertaking to pay these the order will be affirmed.

Order affirmed.

Solicitor for plaintiff: *Russ.*
Solicitor for defendants: *A. E. Francis.*

A. P. S.

THE QUEEN ON THE PROSECUTION OF JAMES BARROW *v.* THE OVERSEERS OF ST. MARY MAGDALENE, BERMONDSEY.

1884
Nov. 22.

Poor-rate—Assessment—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), s. 47—*Alteration of Value of Hereditament during Year—Provisional List—Default by Overseers in sending Provisional List—Discretion of Overseers.*

Where a requisition is made to the overseers of a parish to make and send to the assessment committee a provisional list under s. 47 of the Valuation (Metropolis) Act, 1869, containing the gross and rateable value of an hereditament, on the ground that the value has been increased or diminished during the year, the overseers are not bound to comply with the requisition if they are of opinion that no such alteration in value has taken place, and a mandamus will not be granted to compel them to do so.

RULE calling on the defendants, the overseers of the poor of the parish of St. Mary Magdalene, Bermondsey, to shew cause why a writ of mandamus should not issue commanding them to make out and send to the assessment committee of the union of St. Olave, Bermondsey, a provisional list containing the gross and rateable value reduced of certain premises, 29, Layard Road, in such parish and union.

It appeared from the affidavits that the prosecutor, James Barrow, was the freeholder of the premises, which, at the quinquennial assessment on the 6th of April, 1880, were valued at 153*l.* gross and 128*l.* rateable value. Subsequently the premises were let to a quarterly tenant from the 29th of September, 1882, at a rental amounting to 100*l.* a year.

On the 3rd of May, 1883, a supplemental valuation list, which had been made out by the overseers in accordance with s. 46 of the Valuation (Metropolis) Act, 1869, was deposited with the assessment committee. This list did not include the premises in question, and the prosecutor in the following June appealed against it on that ground to the assessment committee, who decided against the appeal. Afterwards, in November of the same year, the prosecutor sent to the overseers a requisition requiring them to insert the premises in a provisional list under s. 47 of the Act at reduced gross and rateable values. The overseers after investigation came to the conclusion that the rent paid was not a fair test of the value of the premises for rating purposes, and that there had been no alteration in the value, and they refused to make any provisional list.

The Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), by s. 47 enacts: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect:

(1) The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee, or of any ratepayer of the union, or of the surveyor of taxes for the district shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament.

(2) A copy of the requisition shall be sent by the person making it to the clerk of the assessment committee, and if within fourteen days after the requisition has been served on the overseers they make default in sending such provisional list, he shall forthwith summon the assessment committee, and the assessment committee shall appoint a person to make such provisional list in the same manner as is in this Act provided in the case of the overseers failing to transmit a valuation list . . ."

This rule having been obtained—

Holl, Q.C. (*R. C. Glen* with him), shewed cause. The 47th section is governed by the word "if" at the commencement, and there can be no obligation to make out a provisional list except there has been an alteration in value. This no doubt is a question of fact, but it is within the jurisdiction of the overseers to decide it, and their decision, so long as they act within their authority, is not subject to review: *Reg.* v. *Justices of Middlesex.* (1) If the person who makes the requisition is not satisfied with the decision of the overseers his remedy is under sub-s. 2 of s. 47.

S. Woolf (*Mote*, with him), contrà. There is a duty on the overseers, and the only course open to the prosecutor is to apply for a mandamus to compel them to discharge it. For otherwise he is without remedy, as no action will lie against the assessment committee: *Leicester Waterworks Co.* v. *Nuttall* (2); nor can he ask for a mandamus against them. In refusing to send in a provisional list the overseers are assuming the functions of the assessment committee, and deciding without appeal that there has been no alteration in value. They "may," in the absence of requisition, exercise their judgment as to whether to send in a provisional list, but when there is a requisition they "shall" send in such a list, and they have no option in the matter. The actual rent paid was evidence of a reduction in the value of the premises: *Reg.* v. *Poplar Union Assessment Committee.* (1)

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(1) 2 Q. B. D. at p. 520.

(2) 4 Q. B. D. 18.

GROVE, J. At the beginning of this case I found some difficulty in giving the proper meaning to the words "such provisional list" in the 2nd subsection of s. 47; I still think that "such" is not perhaps the best word that could have been used; that it would have been much better had the Act said "shall appoint a person to make a provisional list in the same manner as is in this Act provided in the case of the overseers" because "such provisional list" would, at first sight, appear to mean one made by the overseers. But when I read the whole section I am clear that the words must mean "such provisional list if any;" otherwise no sense or meaning can be given to the rest of the section. The provisional list is not a mere repetition of the existing list, but it is a provision for cases where there has been an alteration in value. In that case the overseers may, and on the written requisition of the assessment committee, or of any ratepayer, or of the surveyor of taxes for the district shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditaments. They may do it of their own accord; but if they do not, then they must do it on the requisition of the assessment committee, of the ratepayer, or of the surveyor of taxes, but all that is contingent on the value being increased or reduced. Putting out of the question the slight verbal difficulty arising from the word "such," which at first a little embarrassed me because I could not construe "such" grammatically without assuming that before there could be "such" provisional list there was some provisional list: when I come to read the whole section it seems to me to be perfectly clear that by "such provisional list" is meant "such provisional list, if any, as may be made by the overseers," because otherwise we should have this absurdity—that they are to send some list, either the original list, which is not a provisional list, and which would be of no use, or some provisional list which they know to be untrue and incorrect. Supposing we grant this mandamus, what are the overseers to do? If the value is not changed how can they return an answer to this mandamus except by saying, "We have not sent a provisional list because we can make no provisional list, the value being unchanged." I think if this rule were made absolute that would be a good return to it, and we are now asked to grant a mandamus simply to compel them to say that it is an impossibility to comply with it. It seems to me that the matter is perfectly regular as far as the overseers are concerned, and that there is no reason for commanding them to do what they cannot do, therefore I am of the opinion that this rule should be discharged.

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(1) 13 Q. B. D. 364.

HAWKINS, J. I am of the same opinion. This rule was moved for on the 20th of March, 1884; it calls upon the overseers of the parish of St. Mary Magdalene, Bermondsey, to shew cause why a writ of mandamus should not issue directed to them, commanding them to make out and send in to the assessment committee of the union of St. Olave, Bermondsey, a provisional list containing the gross and rateable value reduced of certain premises. To my mind there are two answers to this rule—first, that the rule is moved for too late; second, that even if the rule had been moved for within the year in which the alleged reduction in value took place, there is no ground for making it absolute. It is necessary, in order to explain what I have to say, that I should shortly review some of the provisions of the Valuation (Metropolis) Act, 1869. The 6th section requires that the overseers of every parish to which this Act extends—and it does extend to the parish in question—within the time mentioned shall make and sign a valuation list of their parish in duplicate in accordance with the Act; and s. 13 provides that if the overseers of any parish fail to transmit such a valuation list as is required by this Act, the assessment committee shall appoint some person to make a valuation list, and may allow such person such remuneration as they may think fit; and all expenses incurred by the assessment committee in pursuance of this section shall be paid by the guardians and charged by them to such parish, and the person so appointed, that is, the person appointed by the assessment committee, shall have, for the purposes of this section, the same powers and duties as the overseers; and the valuation list so made shall be dealt with in a like manner as if it had been duly made and transmitted by the overseers; that is so as to give the same force and power to the valuation list made by the person appointed by the assessment committee on the default of the overseers, as is given to the valuation list when the overseers themselves make it. The 43rd section provides that the valuation list as approved by the assessment committee—and if altered on any appeal under this Act, as so altered—shall come into force at the beginning of the year, commencing on the 6th of April succeeding to that on which it is made, and shall last for five years, subject to any alteration that may be made by any supplemental or provisional list. A valuation list thus means the list which is made in pursuance of the sections to which I have referred, and which is to last for five years in its integrity, subject to any alterations that may be made by any supplemental or provisional list. In the case of the valuation list of a large parish where there are hundreds of houses and buildings of every class and character, it is obvious that each year there will be a great many alterations. If no change were made in the valuation list during the whole five years for which the valuation list is made, a great deal of injustice would be done, and in order to provide against that, the 46th section requires that a supplemental list shall be made at the commencement of each one of the four years following the making of the valuation list, shewing all the alterations which have taken place during the preceding twelve months, but containing only the hereditaments affected by such alterations. If no alteration has taken place which makes a supplemental list necessary, the overseers are to send a certificate to that effect to the assessment committee in place of such list. Further, it is provided that the same regulations shall be observed in the case of a supplemental list as in the case of a valuation list directed by this Act, which I suppose includes the power to appeal against the supplemental list in the same way that powers are given to appeal against the original valuation.

Now it is obvious that notwithstanding the supplemental list being made at the commencement of each year—there may be in the course of any year alterations in value, and the 47th section is intended to provide for such a state of things. There is no obligation to send in a list at the mere will of anybody who chooses to make a requisition, but it is only to be a provisional list containing the gross and rateable value of property which in fact in the course of the year happens to be either increased or reduced in value. The requisition is to be served on the overseers, but a copy is to be sent by the person making it to the clerk to the assessment committee, and if within fourteen days after the requisition has been served on the overseers they make default in sending such provisional list, he shall forthwith summon the assessment committee, and the assessment committee shall appoint a person to make such provisional list in the same manner as is in this Act provided in case of the overseers failing to transmit a valuation list. Turning back again to the 13th section, we see that if the overseers will not make out the original valuation list the assessment committee may appoint a person to do it and pay him and charge the expenses to the overseers, and when the valuation list is so made out by the person so appointed, the list so made out shall be treated in the same way and treated as of the same authority as if it had been actually returned by the overseers themselves. It really is to my mind as clear as possible that the overseers are not bound to send in a provisional list if they come to the conclusion that there is no alteration in the value of the property which is assessed, but that if they decline to do so and if the person who requires them to send in the provisional list still insists upon it that he is right, he may require that the assessment committee shall call upon some other person to make the valuation, and if that is done and the person who made the requisition is not satisfied he may appeal precisely in the same manner that he might if the list was made by the overseers. I am satisfied in my mind that there is no obligation on the overseers to send in a list which they know and feel to be fictitious and false, and on this ground I am clearly of opinion that this rule ought to be discharged. There is, however, another ground on which I think it ought to be discharged, and which may be said to be upon a more technical ground, the affidavit which is before me sets forth this: that these premises became in the month of January, 1880, vacant, that the applicant was unable to procure any tenant for such premises until the 29th of September, 1882, when he let them at the best rent he could to a quarterly tenant, at a rent of 100*l.* per annum, and that such premises then became and have ever since continued reduced in value. At the commencement of the year 1883, there was a supplemental list made out which took the place of the original valuation list, and against that supplemental list the applicant might have appealed if he had thought fit. If in the year 1883, there had been a further diminution in value that might have been the subject of an application to the assessment committee during the year 1883, but 1884 has arrived and a new supplemental valuation is made in 1884, and there is no appeal against that. There is no evidence at all before us of any diminution of value in this property in 1883 or 1884, and therefore the conditions upon which the person dissatisfied is entitled to make an appeal against the provisional list have not occurred, for the 47th section only gives the right to require a provisional list if "in the course of any year" the value is increased or reduced, which cannot be said to be the case on the present occasion. I am of opinion therefore on this ground also that the rule ought to be discharged. I will only add that if the applicant were to be successful in this rule it would be giving a double appeal, one at the commencement of the year against the supplemental list, and another (though there had been no reduction of value within the year) by a mere process of making requisition for a provisional list.

Rule discharged.

Solicitor for prosecution: *J. Mote.*
Solicitor for defendants: *J. Harrison.*

A. M.

1884
Dec. 10.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* WHITE AND OTHERS.

Poor-rate—Overseers of Parish—Bill in Parliament affecting Parish—Opposition by Overseers—Costs of Opposition.

A private bill before Parliament provided for the punctual payment of interest on the share capital of the undertaking for which authority was sought by declaring that the overseers of the parish in which the undertaking was situated should, when required to do so, raise as part of the poor-rate money for the payment of such interest. The overseers, with the authority of the vestry, successfully opposed the bill, and in so doing incurred certain expenses which were not immoderate and were allowed by the auditor:—

Held, reversing the decision of the Queen's Bench Division, that the overseers were entitled to charge the expenses so incurred upon the poor-rate.

Appeal against an order of the Queen's Bench Division quashing a certificate of allowance by G. S. White, the auditor of the Gloucestershire Audit District, of certain expenses incurred by the overseers of the parish of St. George in the Barton Regis Union, Gloucestershire.

The overseers of the parish of St. George, Barton Regis Union, Gloucestershire, at the request of the vestry, opposed in Parliament a bill for making certain docks promoted by private individuals, entitled "the Bristol Port and Docks Commission Bill," and which contained, inter alia, a clause by which the overseers of the parish of St. George would have to raise as part of the poor-rate a sum of money for payment of interest on the share capital of the undertaking in case the commissioners incorporated by the bill should not have sufficient funds to provide for the payment of such interest. The bill was rejected by a committee of the House of Lords, but the overseers incurred expenses by reason of their opposition, which amounted to £327 14*s.* 8*d.*, and they charged this sum in their parish accounts, and the auditor, G. S. White, allowed it. Thereupon, at the instance of Sibly, a ratepayer, a writ of certiorari was obtained to bring up the auditor's certificate to be quashed (1), and the same was accordingly brought up to, and ordered to be quashed by, the Queen's Bench Division.

The overseers appealed.

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(1) 11 Q. B. D. 309.

A. Charles, Q.C., and *Pitt Lewis*, for the appellants. The Queen's Bench Division held, on the authority of *Rex* v. *Stewart* (1), that the overseers were not entitled to charge the rates with the expenses they had incurred in opposing the bill in Parliament, as they were officers dealing with a statutable fund and accountable for its application to statutable purposes, namely, the relief and employment of the chargeable poor, and that they had no power to divert it from those objects. The power of the overseers to spend such money is not so restricted, they are entitled to spend it to a reasonable extent in protecting the rates and further in protecting the office of overseers. The case of *Rex* v. *Inhabitants of Essex* (2), which inadvertently was not cited on the argument before the Divisional Court, fully bears out this principle, and shews that overseers would be justified in charging the poor-rate with such an expense as this which was reasonably spent in protecting it. In that case the justices were held entitled to defray out of the county stock costs incurred by them in bonâ fide for the interest of the county litigating the question of a fine which they thought was improperly imposed on the county, and Lord Kenyon, C.J., and Ashhurst, J., considered it to be analogous to the settlement cases of defending appeals against orders of removal. This very statute of 43 Eliz. c. 2, was there referred to, and Ashhurst, J., said: "It might therefore be argued that the stock should not be applied to any other purposes than those specifically mentioned; but a subsequent statute having directed the removal of paupers, and the expense of litigating the questions of settlement being a consequence upon such removal, it has been the constant practice to allow these expenses to be defrayed out of the parish stock, the legality of which has never been disputed." The case of *Rex* v. *Inhabitants of Essex* (2) was cited and its principle adopted in *Rex* v. *Commissioners of Sewers for the Tower Hamlets.* (3) In *Bright* v. *North* (4) commissioners who had to apply funds under an Act of Parliament for maintaining the banks of the river were held authorized in applying a portion of such fund in opposing a bill in Parliament which had a project likely to injure the banks

(1) 12 Ad. & E. 773.

(2) 4 T. R. 591.

(3) 1 B. & Ad. 232.

(4) 2 Ph. 216.

under their superintendence. The case of *Attorney-General* v. *Mayor of Brecon* (1) was also decided on the same principle.

Matthews, Q.C., and *A. Glen*, for the respondent. The duty of overseers is confined to the administration of the funds received from the poor-rate which is in their possession. It is no part of their duty to either originate or to oppose bills in Parliament affecting the poor-rates, and they cannot charge the rate with any expense they may incur in so doing. Since *Rex* v. *Inhabitants of Essex* (2) the functions of an overseer have been very much changed, and they are now nearly only ministerial, and he must act as ordered by the Local Government Board. *Rex* v. *Inhabitants of Essex* (2) was cited in *Reg.* v. *Fouch* (3); but notwithstanding that the Court there held that the overseers were not entitled in their account with their parish to charge their costs in defending an appeal against a rate they had made.

[LINDLEY, L.J. There they had no defence, and their costs were improperly incurred.]

The authority of the vestry to oppose the bill is immaterial, and cannot be any protection to the overseers: *Rex* v. *Gwyer* (4); and *Rex* v. *Johnson.* (5) [They also cited *Attorney General* v. *Wilkinson.* (6)]

H. D. Greene, and *W. Wigram*, for the auditor.

BRETT, M.R. In this case a private bill was brought into Parliament for the purpose of making certain docks, and there was a clause in that bill which would have thrown the burden, as I understand it, by way of guarantee, on the rates of the parish; whereupon the overseers called a meeting of the vestry, and the vestry unanimously came to the conclusion that the overseers ought to oppose the bill in as far as that clause was concerned. The overseers accordingly did, in their official capacity, petition against the bill, and they opposed it with success. They afterwards charged the expenses of the opposition, to which they were primarily liable, in their parish accounts, and the auditor allowed the charge, but the Divisional Court of Queen's Bench quashed his certificate on the ground that the expense of their opposition was a burden which could not be legally placed on the rates. Now, the question before us by way of appeal is whether such expense was under the circumstances of this case a proper burden to be put upon the rates, and whether therefore the auditor was justified in allowing it. A very important case has been cited to us which was not cited to the Divisional Court. Cases were cited there which, in my opinion, that Court was justified in saying did not apply, but the case of *Rex* v. *Inhabitants of Essex* (1), which I think governs this case, was not cited. Now, it has been argued that overseers are mere ministerial agents or officers. It is admitted that in the old days they were not, but it is said, that by a course of legislation they have become so. In my opinion they are not now any more than they formerly were so. They are the persons who by law are to make the rate. It is true they have to make the rate to meet expenditures which have been incurred by other people independently of them, as for instance, for the relief of the poor, which is now under the control of the guardians of unions subject to the control of the Local Government Board. There are many other expenses put upon the poor-rate, and for which the overseers in making the rate must provide. The overseers when about to make a rate have to take into account all the different things which they have to provide for out of the rates, and then it is their duty to make the rate, and, as it is admitted, with a margin, as to the extent of which they are the judges. Moreover, the rate in a great many respects, if not in all respects, is a prospective rate; therefore, to say that overseers who have to make those calculations and to consider those matters are merely ministerial officers seems to me to be clearly wrong. If it is the duty of overseers to make the rate it is to make a rate which upon the whole shall produce no more than it fairly ought, because if they make too large a rate they lay an improper burden on the ratepayers. They must not, therefore, make an exorbitant rate. Further, it cannot be denied, that it is part of the duty of overseers to see that no improper, that is, illegal, burden is put upon the rates. For instance, it is admitted that if there is an attempt to impose upon their parish a

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(1) 10 Ch. D. 204.

(2) 4 T. R. 591.

(3) 2 Q. B. 308; 11 L. J. (M.C.) 1.

(4) 2 Ad. & E. 216.

(5) 5 Ad. & E. 340.

(6) 28 L. J. (Ch.) 392.

(1) 4 T. R. 591.

pauper who really is not settled in their parish, it is the duty of the overseers to resist that. Then, if it is their duty to see that the rates are not improperly burdened, what is the necessary consequence, but that they are entitled to defend the rates for the benefit of the parish.

Overseers are persons upon whom the law casts a considerable duty without remuneration, and it necessarily follows that where they have rightly protected the ratepayers their moderate expenses of so doing have always been allowed in any rating or settlement case. But it was suggested that it had never gone beyond rating or settlement cases, and *Rex* v. *Inhabitants of Essex* (1) was not cited in the Court below. In that case the judges of the King's Bench went further than a mere settlement case, and in an analogous case, where the justices spent money out of the county stock to protect it from a burden which they alleged ought not to be put upon it, the judges held that it came within the principles of a settlement case and was to be ruled by the same law.

The authority of that case was afterwards recognised in *Rex* v. *Commissioners of Sewers for the Tower Hamlets* (2), and the question before us must therefore be whether that principle is applicable to the present case, for I am not in the least prepared to overrule *Rex* v. *Inhabitants of Essex* (1), since the principle there stated is right and just, and one which ought to be adopted. Then does the present case come within it? Here the attempt was to throw a burden upon the rates of this parish in favour of persons who were promoting a private bill in Parliament. The principle does not apply to a public bill which has to be considered by the legislature as for the benefit of the whole country; but this was not a public but a private bill. Might, then, the overseers under those circumstances incur expense to protect the rates from an attempt to place such a burden on them? It seems to me that it falls within the principle of *Rex* v. *Inhabitants of Essex* (1), and that they might. I wish it to be understood that I do not say that they could originate litigation, and that the principle which allows them to incur expense for the protection of the ratepayers is confined to defending

(1) 4 T. R. 591.

(2) 1 B. & Ad. 232.

their rates against an attack made upon them at law. Here what the overseers did was a pure matter of defence against a project by private persons, by which the rates might have been burdened, and the auditor has come to the opinion that they acted reasonably, and nobody has alleged that they incurred any immoderate expense. Therefore I am of opinion that the case of *Rex* v. *Inhabitants of Essex* (1) and the principle there laid down justified these overseers in incurring the expense which they did, and justified the auditor in allowing such expense out of the rates. Consequently, I think the judgment of the Divisional Court must be overruled, and the appeal must be allowed.

COTTON, L.J. I agree. I think that this expenditure ought to be allowed on the principle laid down by the Master of the Rolls, and I need not add anything further.

LINDLEY, L.J. I am of the same opinion, and will only add that I wish it to be understood that I think this principle ought to be confined either to cases exactly like, or to cases so near to this, that no practical distinction can be drawn. What I mean is, that in this case there was a bill in Parliament promoted by private individuals for the purposes of profit to themselves, and they sought to burden the rates of the parish for their own individual benefit with no public advantage. It appears to me, that the vestry having authorized the overseers to oppose such a bill, they were justified in doing it and paying the expense out of the rates.

Decision reversed.

Solicitors for appellants: *Warry, Robins, Burges, & Co., for J. & S. Dix, Bristol.*

Solicitors for auditor: *Peacock & Goddard, for Mullings, Ellett, & Co., Cirencester.*

Solicitors for respondent: *Merediths, Roberts, & Mills, for Osborne, Ward, Vassall, & Co., Bristol.*

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(1) 4 T. R. 591.

W. P.

1884
Dec. 16.

THE QUEEN ON THE PROSECUTION OF R. S. WILKINS *v.* FLAVELL AND ANOTHER, JUSTICES OF LEAMINGTON.

Bastardy—Witness—Voluntary Attendance—Refusal to give Evidence—Power of Justices to commit—7 & 8 *Vict. c.* 101, *s.* 70—*Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict. c.* 65), *s.* 4.

By 7 & 8 Vict. c. 101, s. 70, justices may at the request of any party to bastardy proceedings before them summon any person to appear and give evidence upon the matter of such proceedings, and if the person summoned neglect or refuse to appear the justice by warrant may require such person to be brought before him or any justices before whom such proceedings are to be had, "and if any person coming or brought before any such justice in any such proceedings refuse to give evidence thereon," the justices may commit such person to the house of correction:—

Held (by Grove and Hawkins, JJ., Smith, J., dissenting), that the power to commit extended to any witness, and was not confined to witnesses who appeared in answer to a summons or warrant.

Rule calling on the defendants, justices of Leamington, to shew cause why an order for the committal of the prosecutor should not be brought up by certiorari to be quashed.

It appeared that a bastardy summons was taken out against the prosecutor, R. S. Wilkins, as the alleged father of an illegitimate child. On the hearing of the summons at petty sessions held at Leamington, after the evidence of the mother of the child, and corroborative evidence brought forward by her had been heard, Wilkins tendered himself as a witness, and was sworn, and gave evidence contradicting that of the applicant. In cross-examination he was asked certain questions which, in the opinion of the justices, were material. Wilkins declined to answer these questions, and, through his advocate, stated that he withdrew his defence and consented to an affiliation order being made against him. The justices, however, were of opinion that he was bound to answer the questions, and on his still refusing to do so they, purporting to act under 7 & 8 Vict. c. 101, s. 70 (1), committed him to prison for seven days, or until such time as he should submit himself to examination and answer the questions demanded of him.

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(1) Sect. 70 of 7 & 8 Vict. c. 101, enacts that "in any proceedings to be had before justices in petty or special sessions, or out of sessions, under the provisions of this Act, or of any Act required to be construed as one herewith, if any party to such proceedings request that any person be summoned to appear as a witness in such proceedings, it shall be lawful for any justice

A rule nisi was obtained for a certiorari to bring up this order, against which

Dugdale, Q.C. (*W. Graham*, with him), shewed cause. The justices had jurisdiction to make the order. Wilkins was a witness "coming" before them, and so within the words of the statute. It is quite as important that there should be some control over a person who tenders himself as a witness as over one who appears in obedience to the process of the Court. Cases of bastardy summonses are not included in Jervis's Act (11 & 12 Vict. c. 43). In that Act the words in s. 7 giving a similar power to commit are: "If on the appearance of such person so summoned . . . . either in obedience to the said summons or upon being brought before him or them by virtue of the said warrant, such person shall refuse," &c., and are not so wide as those used in 7 & 8 Vict. c. 101, s. 70. The mode of summoning witnesses is now regulated by 35 & 36 Vict. c. 65, ss. 3, 4, but the control of the Court over a person who has either voluntarily or otherwise become a witness remains as it was under the earlier statute.

Macmorran, in support of the rule. There are two objections to the order. A bastardy summons is a civil proceeding, and the defendant is not bound to appear, and if he does may consent to

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to summon such person to appear and give evidence upon the matter of such proceedings; and if any person so summoned neglect or refuse to appear to give evidence at the time and place appointed in such summons, and if proof upon oath be given of personal service of the summons upon such person, and that the reasonable expenses of attendance were paid or tendered to such person, it shall be lawful for such justice, by warrant under his hand and seal, to require such person to be brought before him, or any justices before whom such proceedings are to be had; and if any person coming or brought before any such justices in any such proceedings refuse to give evidence thereon it shall be lawful for such justices to commit such person to any house of correction within their jurisdiction, there to remain without bail or mainprize for any time not exceeding fourteen days, or until such person shall sooner submit himself to be examined, and in case of such submission the order of any such justice shall be a sufficient warrant for the discharge of such person."

an order being made against him. Directly Wilkins, by his advocate, consented to an order the power of the justices to proceed with the hearing was at an end.

[GROVE, J. A power to commit for contempt cannot be got rid of by counsel for the party who has committed the contempt withdrawing his case and submitting to judgment.]

The applicant might have withdrawn at any moment, even in the middle of her examination. Then why not the defendant, whose position, as pointed out in *Reg.* v. *Lightfoot* (1), is not that of defendant in a criminal but in a civil case? Further, the section does not apply to a witness who does not appear in obedience to a summons or under a warrant. The defendant to a bastardy summons is not bound to appear, but if his evidence is required by the applicant he can be compelled to appear by summons, and if that is insufficient by warrant. In the former case he or any other witness who is summoned comes before the Court and in the latter is brought, and these two classes of witnesses, those coming on summons and those brought by warrant, satisfy the words of the statute. The power of justices to commit is therefore limited to witnesses appearing under process of the Court and was wrongly exercised in this case.

SMITH, J. In this case I have the misfortune to differ from my learned Brothers, and though naturally doubtful of the correctness of the view I have formed I feel bound to express it. The question arises here whether the justices had power to commit the defendant on the hearing of the bastardy summons as they have done for refusing to give evidence. It seems to be conceded that if the justices had jurisdiction to commit it could only be because this was a bastardy summons, and under this particular Act, 7 & 8 Vict. c. 101, s. 70. In Bacon's Abridgment, tit. Evidence D., it is stated "if a man who is not subpœnaed, happens to be in court during a trial, he shall not be forced to be sworn against his will; but if he consents, the want of a subpœna is not material, and in certain cases the Court will, in discretion, wait till a subpœna can be procured." Therefore I should think, as a general rule that if a witness volunteers his evidence and is sworn, and afterwards refuses to answer questions, he is liable to be committed for contempt. That, however, is a general rule but does not decide this case which turns on the express power given to the justices in bastardy proceedings. It has been pointed out that the defendant in such cases is not bound to appear to the bastardy summons. He may leave matters to take their course. But he may be required as a witness by the complainant, and in that case he can be compelled to appear by summons or warrant under s. 70, just as any other witness may be compelled to appear. Now, reading that section as I think it should be read, it enacts that if any party to the proceedings request that any person be summoned to appear as a witness it shall be lawful for the justice to summon such person to appear and give evidence, and if any person coming before any justices on any such summons on any such proceedings refuse to give evidence thereon he may be committed, and if any person summoned neglects or refuses to appear the justices may by warrant require such person to be brought before them, and if the person brought before them refuses to give evidence the same consequences follow as in the case of a witness appearing to a summons and refusing to give evidence. If the words "coming before the justices" are to include every class of witness the words "brought before the justices" are superfluous, but as I read the section the words are perfectly apt to refer to the two cases, and seem to me to have been put in for the purpose of limiting the jurisdiction of the justices to commit to the case of witnesses appearing to a summons or brought by warrant.

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(1) 25 L. J. (M.C.) 115.

Then it is said this cannot be the true construction, because of the difference in the language used in relation to a similar matter in s. 7 of Jervis's Act, 11 & 12 Vict. c. 43. That section relates to a refusal to take the oath or to answer questions where a witness appears in obedience to the summons or is brought by virtue of a warrant. It is said that the wider language of the Bastardy Act shews that a distinction was intended, and that the power given by Jervis's Act is more limited than that given in the section we are dealing with. I do not, however, think any distinction was intended or ought to be drawn, the object in each case was the same, and it is carried out as I think in the same way. It is quite useless to give power to summon a witness, and in default of his appearance to issue a warrant to bring him before the justices, unless when he comes there or is brought, as the case may be, there is a further power to make him give evidence under penalty of punishment if he does not do so. In my opinion this power is confined to witnesses who appear in answer to a summons or warrant, that is who are compelled to appear, and did not entitle the justices to make the order that they made in this case.

HAWKINS, J. I cannot say that I have had no doubt in this case, but on the whole I have come to the conclusion that a certorari ought not to go. It seems to me that on the true construction of s. 70 of 7 & 8 Vict. c. 101, the justices had jurisdiction to commit the defendant to the bastardy summons when he appeared as a witness for refusing to answer a material question. My reason for taking this view may be expressed in a few words: by the Bastardy Laws Amendment Act, 1872, the justices are to hear the evidence of the woman and any evidence she may produce, and also to hear any evidence tendered by or on behalf of the person alleged to be the father. If the evidence of the mother is corroborated they may adjudge the defendant to be the putative father. It is not disputed that the person charged as the putative father is a competent witness.

We have seen that the mother may give her own evidence and produce that of other persons, but it may be that the witnesses may be unwilling to appear merely on being asked to do so. Turning to s. 70 we see the process for compelling the attendance of persons who may throw light on the case, but who cannot be relied on to volunteer to give evidence. They may be summoned and if they still do not appear may be brought before the justices on a warrant. Sect. 70 continues thus: "and if any person coming or brought before such justices in any such proceeding." The words are not "any person coming or brought in answer to a summons or by warrant respectively," and I see nothing to limit them, or to make me say that they do not apply as much to a witness coming voluntarily before the justices as to one either coming in answer to a summons or brought up on a warrant. I can see no reason for drawing such a distinction. It strikes me that when a witness has entered the witness box and taken the oath, it makes no difference in his duty or liability whether he came there voluntarily or not, in either case he comes before the justices, and is answerable to their jurisdiction. I think it would be mischievous to the last degree if this penalty were held to be applicable only to persons who attend under process, so that a voluntary witness might go into the box and say just so much or so little as he pleased, and shut his mouth directly he thought proper to do so. I do not think that is the law, but in my opinion when a man goes into the witness box and takes the oath, and is sworn to give evidence in the matters relating to the charge he has come before the justices, and they have jurisdiction to compel him under pain of commitment to answer relevant questions.

Grove, J. I have come to the same conclusion as my Brother Hawkins. The words of the Act are not a person *so* coming, that is, coming on summons, or *so* brought, that is brought on warrant, but they are "any person coming or brought." The rule for the construction of statutes which is so often enunciated, is the main ground on which I decide this case. There is nothing that I can see in the interpretation I have put on these words which either conflicts with anything else in the statute or makes them unintelligible, and unless one or other of these results is arrived at we ought to construe a statute just as we would any document that required to be construed. In this case, too, there is nothing in the object of the statute to make us put a narrower interpretation on the words than they would naturally bear. The fact, indeed, is just the other way, for it can hardly be thought desirable that a witness should have power to come before a Court and say that he will answer any question of which he approves, but that when a question which he does not like is put, he will decline to answer it. The evidence of such a witness would be perfectly useless, and it would be an idle waste of time for him to go into the box. The magistrates would have no power to refuse the evidence tendered, yet they would have, if the witness selected what questions he would answer and declined to answer others, either to accept his partial account or to reject the evidence altogether. The only argument that I can see for the proposed limitation of the words is, that they occur at the end of a section which deals with the bringing of witnesses before the justices. Now, suppose the section had been divided into two, and a new start made at the words "If any person coming or brought," I do not think any doubt in that case could have arisen that if a man came in any way as a witness before the justices the section would apply to him. The doubt arises from these general words, as I think them, being added to a section which deals with appearance under compulsory process. If the words had been introduced by a proviso, I think they might have had to be read subject to the limitations of the previous part of the section. But that is not the case, and I do not see why we should limit the words "coming before any such justice" to cases of coming in obedience to a summons. As to the difference suggested between Jervis's Act and this Act, we cannot go behind the words of this Act and speculate as to what the draftsman meant, but we must take the words as they stand. The words are different from, and wider than, those used in Jervis's Act, and I think we must take it that this difference is intentional. Especially when we find these wider words carrying out the general scope and intention of the Act better than would those from which they differ. There is a special reason why the power to compel a witness to answer relevant questions should be wider in bastardy cases than in most other cases before justices, because in such cases unless the matter is let go by default the defendant almost invariably tenders himself as a witness in support of his own case. It may be said this is conjecture as to the intention of the Act, but at any rate, there is nothing to point to the desirability of the words being interpreted in a narrower sense than if they stood alone; and I think, applying the ordinary rules of construction, the justices had jurisdiction in this case, and the rule for a certiorari must be refused with costs.

Rule refused.

Solicitors for prosecution: *H. C. Barker, for C. Davies, Leamington.*

Solicitors for justices: *Henry Tyrrell, for H. C. Passman, Leamington.*

A. M.

[IN THE COURT OF APPEAL.]

1884
April 30.

ROBINSON AND ANOTHER *v.* TUCKER.

Practice—Interpleader—Appeal—Judge finally disposing of whole Matter—Supreme Court of Judicature Act, 1873 (36 *&* 37 *Vict.* c. 66), s. 19—*Rules of the Supreme Court*, 1883, *Order XL., r.* 5; *Order LVII. r.* 13.

When an interpleader issue has been tried by a judge and a jury, and upon the finding of the jury the judge has, under Order LVII., r. 13, pronounced judgment disposing of the whole matter of the interpleader proceedings, but has given leave to appeal, a party to the issue who is dissatisfied with both the finding of the jury and the judgment of the judge, may appeal under Order XL., r. 5, to a Divisional Court of the Queen's Bench Division, and under the Supreme Court of Judicature Act, 1873, s. 19, from that Court to the Court of Appeal.

Semble, that *Burstall* v. *Bryant* (12 Q. B. D. 103) was wrongly decided.

AN interpleader issue was directed to try whether certain goods and chattels seized by the sheriff of Middlesex under a writ of fieri facias issued out of the Queen's Bench Division for having execution of a judgment recovered by the defendant (Adeline Florence Tucker) against John Tucker, were, at the time of the seizure, the property of the plaintiffs as against the defendant.

By the order under which the interpleader issue was directed, all questions of costs and all further questions were to be reserved until after the trial of the issue. A sum of 1322*l.* 19*s.* 2*d.*, being the proceeds of the sale of the goods mentioned in the issue, was paid into court to abide the event of the issue.

The issue came on for trial before Williams, J., and a jury, and the case having been adjourned for further consideration, upon the finding of fact by the jury the learned judge directed that a verdict and judgment should be entered for the plaintiffs with costs, and gave special leave to the defendant to appeal. The learned judge further directed that the money, 1322*l.* 19*s.* 2*d.*, paid into court, should be paid out to the plaintiffs, or one of them, subject to their undertaking to repay, and also that the time for moving the Divisional Court should be extended in case motion ought to be made there, and that as to costs execution should be stayed until the appeal should be disposed of.

The defendant moved in the Queen's Bench Division to set aside the verdict and judgment for the plaintiffs, and instead thereof to enter judgment for the defendant, or for a new trial on the ground of misdirection and of the verdict being against the weight of evidence, and also she moved for judgment on the ground that upon the finding of the jury upon the question submitted to them the judgment was wrongly entered, and ought to have been entered for the defendant.

The Queen's Bench Division (Denman and Manisty, JJ.), having dismissed the defendant's application, she appealed to the Court of Appeal. She also appealed against the judgment of Williams, J., pursuant to the special leave granted to her, on the ground that upon the finding of the jury upon the question submitted to them the judgment was wrongly entered and ought to have been entered for the defendant, and also on the ground that the verdict and judgment ought to be set aside and judgment entered for the defendant, or for a new trial on the ground of misdirection and of the verdict being against the weight of evidence.

A. M. Channell, for the defendant. Two appeals have been entered on behalf of the defendant, in order to insure that her objections to the result of the issue in the Queen's Bench Division may be heard in this court; she objects both to the finding of the jury and to the direction and judgment of the judge. For the plaintiffs, however, it is denied that any appeal lies.

Lumley Smith, Q.C. (*Austin*, with him), was called upon to argue for the plaintiffs. In the present case the judge before whom the interpleader issue was tried, has, on further consideration, finally disposed of the whole matter under the Rules of the Supreme Court, 1883, Order LVII., r. 13; this was tantamount to giving judgment at the trial, and when judgment is given at the trial, all right of appeal even to a Divisional Court is taken away; and, therefore, there can be no appeal to this Court.

[BRETT, M.R. Under the Supreme Court of Judicature Act, 1873, s. 19, an appeal lies from every judgment or order of the High Court of Justice to this Court; if the Divisional Court had jurisdiction to hear the motion appealed from, surely this Court has power to entertain an appeal from that decision.]

It is not denied that under the practice existing before the

Supreme Court of Judicature Acts, 1873, 1875, when an interpleader issue was tried by a jury, there might be a motion for a new trial, and there might be under the Common Law Procedure Act, 1854, an appeal to the Court of Exchequer Chamber from a motion of that kind; and it may well be that since the Supreme Court of Judicature Acts, 1873, 1875, there may be an appeal from the verdict at the trial to a Divisional Court, although it is to be observed that *Witt* v. *Parker* (1) was decided long before Rules of the Supreme Court, 1883, came into operation. But Order LVII. of these Rules contains a complete code of procedure, as to interpleader, and by rule 13 of that order the "judge, who tries the issue, may finally dispose of the whole matter of the interpleader proceedings;" it was intended by that rule to put the judge who presides at the trial of an issue in the same position as the Court or a judge at chambers under the former practice; the jurisdiction and the powers of each were to be the same. Under the Interpleader Act (1 & 2 Wm. 4, c. 58), ss. 2, 4, and the Common Law Procedure Act, 1860, ss. 14, 17, there was no appeal from a decision of the Court or from a summary decision of a judge at chambers (2); it follows that when the judge, who tries the issue, finally disposes of the whole matter of the interpleader proceedings, there can be no appeal from his decision.

At all events the decision of the Divisional Court of the Queen's Bench Division cannot be impeached. The High Court of Justice has no power to entertain an appeal against the final decision of an interpleader issue; this is clear from *Burstall* v. *Bryant* (3), even if that case cannot be upheld to its full extent, and the application to the Divisional Court in the present case was properly dismissed for want of jurisdiction. The defendant ought to have appealed simply to the Court of Appeal as to all the points with which she was dissatisfied, and therefore her appeal from the decision of the Divisional Court must fail.

Brett, M.R. When there are interpleader proceedings under Order LVII. three parties are affected by them, namely, the two

(1) 46 L. J. (Q.B.) 450.

(2) See *Dodds* v. *Shepherd*, 1 Ex. D. 75.

(3) 12 Q. B. D. 103.

claimants, and the applicant who desires to interplead. When an interpleader summons has been taken out by the applicant, and the claimants have appeared thereto, the judge under certain circumstances may deal with the question at chambers without more. His order affects the rights of all parties: it was final and without appeal under the Common Law Procedure Act, 1860, ss. 14, 17, and it is so now except by leave. But formerly the judge at chambers might take another course; he might settle an issue between the parties and might direct who was to be the plaintiff and who the defendant in it. The issue settled by him was tried before a judge and a jury. The question raised by the issue was answered by the jury, and the issue, together with the finding of the jury, was taken back to chambers. The finding of the jury was, as to the facts found by it, of course binding upon the judge at chambers, but in other respects he dealt with the rights of the parties as if the issue had not been tried. He then made a final order. As to what the judge at chambers did by that order, however much the party against whom it was made might be dissatisfied with it, he could not legally complain, because there was no appeal. Now, under Rules of the Supreme Court, 1883, Order LVII., r. 11, there may be an appeal against that order by special leave. But if under the old procedure fault was found with the trial of the issue, if there had been a miscarriage at the trial, there might be an application to the Court; it might be on the ground that the verdict was against the weight of evidence, or that there had been misdirection, and the misdirection might be of various kinds; the motion for a new trial was the same as in ordinary cases. An appeal appears to have lain to the Exchequer Chamber; but it is not worth while to inquire as to this point, for under the Judicature Acts there is an appeal. Under the old procedure it is obvious that the motion for a new trial came on before final judgment in the interpleader proceedings, because the judge at chambers would stay his hand if he were told that a motion would be made to the Court. As to the practice under the Judicature Acts, it is not disputed that there may be an application for a new trial if a miscarriage has taken place with regard to the trial of the issue of fact. In that case the party dissatisfied with the result may, it is admitted, and rightly admitted, go to the Divisional Court. It is provided, however, by Order LVII., r. 13, that the "judge who tries the issue may finally dispose of the whole matter of the interpleader proceedings." He has therefore power not merely to dispose of the issue, but also at the trial to give the judgment formerly given by the judge at chambers. It is now contended that if that judgment has been given at the trial, there can be no appeal to the Divisional Court about anything which has happened at the trial. We must look very closely to ascertain whether this contention is correct, because in the present case judgment has been given pursuant to an alleged wrong direction. I think that the rule which I have just cited simply means that the final judgment in the interpleader proceedings given at the trial is final, if it is given pursuant to a proper direction. There are two steps which must be taken, two processes which must be gone through; there is the trial of the issue, and there is the judgment on the whole proceedings; but if a miscarriage has taken place in the trial of the issue, there must be some means of rectifying the judgment. There is nothing to prevent a motion for a new trial, if the issue has been tried before a jury. Several faults may occur: there may be a misdirection, and there may be a wrong finding; and even if there be no misdirection, the judgment may be wrongly entered upon the findings. If there may be a new trial when the issue is tried by a judge and a jury, there may be equally an appeal where the issue is tried by a judge without a jury. The judge, however, must give leave to appeal from his final judgment before an appeal can lie against it. Formerly, a difficulty existed in the way of a party who was dissatisfied with both the findings upon the issues and with the judgment of the judge. In order to set aside the findings, he was obliged to move in the Divisional Court, and in order to reverse or vary the judgment upon the findings, he was forced to apply to the Court of Appeal. In order to do away with this inconvenience, Order XL., r. 5, was framed, which declares that when there are both an appeal from a judgment and also a motion for a new trial, the application must be made to a Divisional Court. If upon a trial before a jury there is a double fault, the party dissatisfied must apply for relief to a Divisional Court, and in the present case the issues are alleged to

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have been wrongly found, and also the judgment is alleged to be wrong, even although the issues are rightly found; but the judge has given leave to appeal against his judgment, and Order XL., r. 5, applies, and therefore the case was rightly taken before the Divisional Court. If there be an appeal from the trial of the issue tried before a judge without a jury, that appeal will be direct to the Court of Appeal. The question is somewhat intricate, but I hope that I have made my meaning clear.

Bowen, L.J. I am of the same opinion. I need add nothing to what has fallen from the Master of the Rolls.

Fry, L.J. I am of the same opinion. When an interpleader issue has been tried by a jury, there may be two matters to be dealt with by way of appeal, the decision of the interpleader issue by the jury and the judgment pronounced by the judge. As to the first matter, if a party is dissatisfied with the finding of the jury, he must apply to a Divisional Court under Order XXXIX.; there is no appeal from the finding of the jury under Order XL., rr. 3, 4. But where there is an appeal from the judgment of the judge, the party dissatisfied must proceed under the Order which I have last named. The defendant desires to appeal from the judgment of the judge disposing of the whole matter of the interpleader proceedings, and has obtained leave to appeal. The appeal must proceed as in the case of an ordinary action. Then Order XL., r. 5, will prevent any inconvenience; it was intended to meet a case of this kind. The defendant, being dissatisfied both with the finding of the jury and with the judgment of the judge, has rightly applied to the Divisional Court. (1)

The appeal from the Divisional Court of the Queen's Bench Division was then argued upon the merits, and both appeals were ultimately dismissed.

Solicitors for plaintiffs: *Walker, Belward, & Whitfield.*
Solicitors for defendant: *Owles & Collinson.*

(1) See next case.

J. E. H.

[IN THE COURT OF APPEAL.]

1885
Jan. 21.

DAWSON *v.* FOX.

Practice—Interpleader—Trial of Issue—Appeal from Judgment of Judge on such Trial.

Where it is sought to impeach the judgment of a judge on the trial of an interpleader issue with respect only to the finding of the facts or the ruling of the law, and not with respect to the final disposal of the whole matter of the interpleader proceedings, an appeal will lie from such judgment under s. 19 of the Judicature Act, 1873, as it will from any other judgment or order of a judge.

INTERPLEADER issue as to whether certain goods seized under a fi. fa. by the Sheriff of Middlesex, in execution of a judgment recovered by the defendant against one Mary A. Smith, were at the time of the seizure the property of the plaintiff as against the defendant.

The issue was tried at the last Middlesex Michaelmas Sittings before Wills, J., without a jury, when that learned judge gave judgment for the plaintiff with costs, and refused leave to appeal.

R. T. Wright, for the defendant, applied ex parte for leave to appeal. The learned judge decided wrongly both as to the facts and law. By rule 8 of Order LVII. of the Rules of the Supreme Court, 1883, the court or a judge is empowered to decide the claim in a summary manner. Then rule 11 says: "Except where otherwise provided by statute, the judgment in any action or on any issue ordered to be tried or stated in an interpleader proceeding, and the decision of the court or a judge in a summary way under rule 8 of this order, shall be final and conclusive against the claimants, and all persons claiming under them, unless by special leave of the court or judge, as the case may be, or of the Court of Appeal." That is similar to s. 17 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), and it was held by the Court of Appeal in *Witt* v. *Parker* (1), that notwithstanding that section an appeal would lie to the Court of Appeal from a judgment on the trial of an interpleader issue. The question is whether on the construction of rule 11 leave to appeal is now required.

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(1) 46 L. J. (Q.B.) 450.

BRETT, M.R. Before the Rules of the Supreme Court, 1883, it had been settled by the Common Law Procedure Act, 1860, that the disposal of an interpleader matter by the Court or summarily by a judge at chambers was final, and therefore there was no appeal from the judgment in such a case. The judgment or direction, however, at the trial of an interpleader issue was not the disposal of the whole matter of the interpleader and was not final; the trial of the issue was the finding of a fact or facts which enabled the judge at chambers or the Court to make the final order or judgment; the order or direction or judgment, therefore, at the trial of the issue, not being by any statute final, is, like any other judgment or order of a judge of the High Court, subject to appeal under s. 19 of the Judicature Act, 1873. Therefore at the time when the rules of 1883 were made, there was an appeal from the judgment on the trial of an interpleader issue. It was then thought right to deal with interpleaders by the rules of 1883 on the footing that instead of a statute, everything regulating interpleader proceedings should be provided for by the rules, and therefore rule 11 of Order LVII. was made as a substitute for the statutory enactment. The words of that rule have been carefully selected to shew that the rule makes no alteration of the law. As was formerly the case, so now, the whole interpleader matter may be finally disposed of in a summary way by the Court or by a judge at chambers, or by the judge at the trial after he has determined the trial of the issue. None of these can be appealed against without leave; but the appeal given by the Judicature Act, 1873 from a judgment or order of a judge of the High Court, remains and is applicable to the judgment or order of the judge made for the purpose of determining the result of the trial of the interpleader issue. The appeal in this case being stated to be in respect of some error of the learned judge in the trial of the interpleader issue, as distinguished from a decision by him of the interpleader proceeding, we think that the motion should be on notice and not ex parte for leave to appeal.

COTTON, L.J., concurred.

LINDLEY, L.J. I also agree that no leave is necessary. The intention of the framers of Order LVII. was to put into it all that was contained relating to interpleader in the Common Law Procedure Act, 1860, and such of the Chancery Orders as could be worked with it. The 17th section of the Common Law Procedure Act, 1860, is practically embodied in rule 11 of Order LVII., and therefore the decision of the Court or judge as to the whole of an interpleader matter is to be final and so without appeal, but the judgment of a judge on the trial of the issue is another matter, and from such, an appeal lies under s. 19 of the Judicature Act, 1873.

Application refused. (1)

Solicitor for applicant: *M. T. Hodding.*

W. P.

IN RE THOMAS. EX PARTE POPPLETON.

1884
Nov. 10.

Company—Unregistered Loan Society of less than twenty Members—Borrowing Member — Subsequent Increase of Members—Registration—Acquiescence—Bankruptcy of Borrowing Member—Proof for Loan—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 4.

An unregistered money club, which in its inception comprises less than twenty members, becomes an illegal association within s. 4 of the Companies Act, 1862, so soon as it comprises upwards of twenty members. Such a society is none the less within the mischief of the Act because its business is carried on and managed by a committee of seven members as the agents of the society, although they may have full powers as to management and may make by-laws. *Crowther* v. *Thorley* (32 W. R. 350) distinguished.

In 1881 seven persons formed a loan society, and when business was commenced their members had increased to twenty. In June, 1883, the society was registered under the Companies Act, 1862, with the knowledge and consent of all the members. In 1881 the society advanced 100*l.* to a borrowing member, repayable by monthly instalments, and he duly paid the instalments as they fell due until December, 1883, when he became bankrupt:—

Held, that under the circumstances the inference was, that all the members had, either expressly or by acquiescence, mutually agreed that all the transactions of the society previous to its registration should continue to be binding on the registered society; and, consequently, that the registered society could prove for the balance of the loan.

THIS was an appeal from a decision of the county court judge at Huddersfield.

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(1) See last case.

On the 28th of January, 1881, seven persons met at the Star Inn, Moldgreen, Huddersfield, and agreed to form a money club, and adjourned the meeting to the 2nd of February, 1881. On that day at the adjourned meeting resolutions were passed that the society should be called the Star Inn Commercial and Building Society, and should commence business on the 2nd of March, 1881. The rules of the society were framed at this meeting, and provided (amongst other things) that the business of the society should be carried on by a committee of seven members, that all the property and assets of the society should be vested in a trustee, and that the committee should be empowered to make such by-laws and regulations for the conduct of the business of the society as they might deem necessary, provided that such by-laws should not be contrary to the spirit of the rules. But the power to alter or repeal the rules themselves was vested in the society in general meeting.

On the 2nd of March, 1881, when the society commenced business, its members had increased to more than twenty, and on the 25th of June, 1883, it was duly incorporated under the Companies Acts, 1862 to 1880, one of its objects being "to acquire and take over the business, assets, and liabilities of the existing society known as "The Star Inn Commercial and Building Society," now carrying on business at the Star Inn, Moldgreen, Huddersfield; to continue the business of the said society, and to collect and recover all or any portion of the debts due to the said society previous to the registration of these presents."

J. H. Thomas was one of the members of the original society, and on the 9th of September, 1881, borrowed 100*l.* of the society —on the security of his promissory note—repayable by monthly instalments of 1*l.* 8*s.* 4*d.* He duly paid his monthly instalments down to June, 1883. He, as well as all the other members, had due notice of and recognised and adopted the incorporation of the society. After the incorporation of the society he paid three more instalments, viz., 2*l.* 17*s.* 3*d.* on the 4th of July, 1883, 2*l.* 17*s.* 3*d.* on the 3rd of October, 1883, and 1*l.* 8*s.* 4*d.* on the 5th of December, 1883.

On the 20th of December, 1883, J. H. Thomas filed his petition for liquidation, under which resolutions were passed for liquidation by arrangement, and the appellant was appointed trustee.

A proof was tendered by W. H. Jessop, as trustee for and on behalf of the registered society, for 68*s.* 18*s.* 4*d.*, being the balance of principal and interest due on the promissory note, but was rejected by the trustee in liquidation on the ground that at the date when the loan was made the society, being unregistered, was illegal, and therefore the debt was not a legal debt. The county court judge having directed the proof to be admitted, the trustee appealed.

Forbes, Q.C., and *Harper*, for the appellant. Although this society when it was first constituted did not comprise twenty members, its members very soon afterwards amounted to twenty, and have ever since remained so. It was unregistered when the debt was contracted, and was, therefore, an illegal association within s. 4 of the Companies Act, 1862, and the proof cannot be sustained. [They were stopped.]

Mr. *S. Learoyd* (solicitor), for the society. *Shaw* v. *Benson* (1) no doubt shews that this society was formed for the purposes of trade, but the 4th section of the Companies Act, 1862, only aims at the *formation* of a company or society. A company can only be *formed* once, and if its original formation is legal the subsequent increase of its members does not invalidate the original legality of the company. It may be registered when its numbers amount to twenty, but registration is not then absolutely necessary. Here the society was originated by seven persons, and its *formation* was completed before it consisted of twenty members: *Shaw* v. *Simmons* (2); *Crowther* v. *Thorley* (3); *Smith* v. *Anderson.* (4) Next, the business of the society before its incorporation was carried on by a committee of seven, and all its property was vested in a trustee. The committee were carrying on the business as the agents of the general body of their constituents. This brought it clearly within the principle of *Crowther* v. *Thorley.* (3) Lastly, all the members agreed to cure their legal infirmity by registering the society. It was

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(1) 11 Q. B. D. 563.

(2) 12 Q. B. D. 116.

(3) 32 W. R. 330.

(4) 15 Ch. D. 273.

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competent for them to do so, and to agree that they all should go on paying and should not take advantage of the previous non-registration of the society, and this agreement to constitute themselves a legal society by registration in consideration of their all agreeing to bind themselves not to take advantage of the legal infirmity created a new contract with a good consideration. Therefore if the debtor could have objected, and did not, but acquiesced in the registration, it is now too late for his trustee in liquidation to object: *Cairncross* v. *Lorimer* (1); *Sharp* v. *Taylor* (2); *Scarfe* v. *Morgan*. (3)

Forbes, Q.C., in reply, on the point of acquiescence. The original society was clearly illegal, and could not sue on the promissory note, and the fact that the new, that is, the registered society, took the note with notice of the illegality puts them in the same position as the old society, and, as they took the note subject to all equities, they took it subject to its original taint, and cannot sue upon it. The proof is on the old promissory note. No consideration was given for it by the new society, who are collecting it as part of the assets of the old society in accordance with their articles. The registration of the old society did not make that valid which was previously invalid. Therefore, if the bankrupt in point of law was not liable to pay, his trustee in bankruptcy is not liable to pay.

CAVE, J. In this case the Star Inn Commercial and Building Society was originally founded by seven or eight persons, who met together on a certain day in January, 1881, and who adjourned their meeting to the 2nd of February, 1881. They then fixed the 2nd of March, 1881, for the payment of contributions and for the commencement of business; and on or before the 2nd of March, 1881, more than twenty persons became members; and the association has consisted of more than twenty from that day to this. I am of opinion that this is clearly an association within the meaning of the 4th section of the Companies Act, 1862. I cannot assent to the doctrine that, because a society is projected by less than twenty people originally, and subsequently grows to more than twenty, it is outside the Act and does not require registration. This would be making a laughing-stock of the Act altogether. In my view the moment the number amounted to twenty it became illegal for them to carry on business without registration. Secondly, it is urged by Mr. Learoyd that, although the members of the association numbered over twenty, yet the business was really carried on by the committee as trustees within the meaning of the decision in *Crowther* v. *Thorley* (1), and consequently it was not bound to be registered under the Act. Now I have the rules of this society before me, which shew that it is a money-lending society, and that the committee are to carry on as agents the business which the individual members cannot carry on. The committee are not to carry on business as trustees, like those in *Crowther* v. *Thorley* (1), but as the agents and officers of the society. The main object of the society in *Crowther* v. *Thorley* (1) was to buy freehold land and divide it amongst the members; and in my opinion the judgment proceeds upon the fact that the trustees carried on business in their own names and were themselves responsible. In this case the committee do not carry on the business in their own names, and are not themselves responsible in any way except that they are bound to carry on the business honestly; and, although they have power to make by-laws, yet those by-laws are all of a subordinate character, and the rules themselves cannot be altered except by the society in general meeting. If I were to hold that this society did not require registration, I should be holding practically that every society numbering over twenty members, and whose business was being carried on by an agent did not require registration. Then comes the third point. I have come to the conclusion, as I have already stated, that the business was being carried on by the society in an illegal manner, and that, down to June, 1883, the debtor might have repudiated his obligation to the society and could not have been compelled to pay the money due to the society; but on the 25th of June, 1883, a very important change took place. It was discovered that they were unprotected, because they were not registered; and thereupon they got themselves registered under the Act. It is sworn by Mr. Jessop that the debtor had notice of the

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(1) 7 Jur. (N.S.) 149.

(2) 2 Ph. 801.

(3) 4 M. & W. 280.

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(1) 32 W. R. 330.

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incorporation of the society, and that since the incorporation he has made three payments at different periods, and that he has recognised and adopted the incorporation. In my opinion the inference is that by express agreement or by acquiescence the parties did agree that they would become registered, and that they would treat all the engagements entered into by the old society as binding on the new society. It was competent for the several members to bind themselves to their old contracts; and the agreement of one was a good consideration for the agreement of the others; and I have no doubt whatever that the members continued to make their payments with notice of that registration. I have offered the trustee an adjournment, to give him an opportunity of shewing how it was that the debtor came to recognise and adopt the registration and to pay the monthly contributions. He has declined the offer; and I am clearly of opinion that, upon the statements contained in the affidavit of Mr. Jessop, and in the absence of any explanation as to these statements from the debtor, the proper conclusion is that the debtor, and the other members, did agree that they would recognise and adopt the incorporation of the society, and they would go on with the new society in the same way as before the registration. Under these circumstances I am of opinion that there was a good debt, and that the proof was rightly admitted; and I dismiss the appeal with costs.

Solicitor for appellants: *C. Fitch, for Milnes & Marshall, Huddersfield.*

Solicitors for respondents: *S. Learoyd & James, for Learoyd & Piercy, Huddersfield.*

H. L. F.

In re GILLESPIE. Ex parte MORRISON.

1884
Dec. 1.

Bankruptcy Practice—Rejection of Proof by Trustee—Appeal—Notice of Motion—Bankruptcy Rules, 1883, *rr.* 19, 174.

If a creditor desires to appeal against the rejection of his proof by the trustee he must give notice of motion in the usual way under r. 19 of the Bankruptcy Rules, 1883, and within the twenty-one days limited by the 174th rule. The old practice of applying to the Court, in the first instance, to fix a time and day for hearing such an application no longer obtains.

This was an appeal by Messrs. Morrison against the rejection of part of their proof by the trustee in bankruptcy.

On the 30th of September, 1884, the trustee gave Messrs. Morrison notice rejecting part of their proof. Messrs. Morrison appealed.

F. C. Willis, for the appellants.

Yate Lee, for the trustee, took the preliminary objection that the appeal was out of time. The notice of motion by way of appeal had not been served within twenty-one days: rules 19 and 174 of the Bankruptcy Rules, 1883.

F. C. Willis. The appeal is in time. The 174th rule is in substance the same as the 74th rule under the Bankruptcy Act, 1869. Under that Act the practice was always first to file an application within twenty-one days, requesting the Court to fix a time and day for hearing an application to reverse or vary the decision of the trustee on the proof; and when the Court fixed a day then notice of motion was given. As the rules under the new Act have not laid down a different practice the old practice has been followed up to the present time. The appellants filed their application on the 20th of October, and were, therefore, in time.

Cave, J. That is not sufficient. I have nothing to do with the practice under the Bankruptcy Act of 1869. I am here to administer the law under the Bankruptcy Act of 1883. The 174th rule provides: "Subject to the power of the Court to extend the time, no application to reverse or vary the decision of an official receiver or trustee in rejecting a proof shall be entertained after the expiration of twenty-one days from the date of the decision complained of." You ought to have given notice of

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motion by way of appeal in the usual way within twenty-one days after the trustee's rejection of your proof. Under the circumstances I will extend the time and hear this appeal on its merits; but I do not extend the time for the purpose of allowing the appellants to raise any technical objection.

Order accordingly.

Solicitors: *Greig, Meikle, & Briggs; Druces, Son, & Attlee.*

H. L. F.

Dec. 3.

IN RE HALL. EX PARTE CLOSE.

Banker and Customer—Pledge of Goods bought on Credit—Delivery Order—Memorandum in Bank Ledger—Bill of Sale—Possession—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 3, 4—*Bills of Sale Act,* 1882 (45 *&* 46 *Vict. c.* 43), *s.* 9.

Whatever documents are included in the expression "bill of sale" as defined by the Bills of Sale Acts, they must still, by force of s. 3 of the Bills of Sale Act, 1878, be limited to documents "whereby the holder or grantee has power to seize or take possession of any personal chattels comprised in or made subject to such" document. The Acts therefore do not include letters of hypothecation accompanying a deposit of goods or pawn tickets given by a pawnbroker, or in fact any case where the object and effect of the transaction are immediately to transfer the possession of the chattels from the grantor to the grantee.

A trader, whose banking account was largely overdrawn, and who required a further advance of 500*l.*, deposited with his bank the invoice of goods bought by him on credit and consigned to him by rail, and gave the bank a delivery order directed to the railway company requiring the company to hold the goods to the order of the bank. The invoice shewed that the goods were bought on credit. On arrival of the goods the company sent the usual advice note to the bank stating that they held the goods to the order of the bank. The 500*l.* was then advanced, and a minute of the transaction, stating the rate of interest on the advance, the terms on which the goods were to be redeemed, &c., was entered in the bank ledger, and was signed by the trader and stamped. Eleven months afterwards the trader became bankrupt:—

Held, that as the effect of the transaction was immediately to transfer the possession of the goods to the bank, the delivery order and minute did not require registration as a bill of sale, and that the title of the bank was good as against the trustee in bankruptcy.

Semble, a pledge by a trader of stock-in-trade which he has bought on credit, and not paid for, is not a "transfer in the ordinary course of business of his trade or calling," within the exception contained in s. 4 of the Bills of Sale Act, 1878.

THIS was an appeal from a decision of the county court judge at Leeds.

W. Hall, a boot and shoe manufacturer, banked with the Exchange and Discount Company, Limited, at Leeds, and on the 9th of November, 1882, his current account being then considerably overdrawn, he applied to the bank for a further advance. He produced to the bank manager an invoice dated the 8th of November, 1882, from which it appeared that he had bought of H. Brown & Sons, of Liverpool, forty bales of Genesee sides (leather), for 951*l.* 15*s.* 10*d.*, the terms being, as stated in the invoice, "one month's open and four months' bills for the amount;" and in consideration of the leather mentioned in the invoice being transferred to the bank the manager agreed to open a special account by which Hall was to be credited with a further sum of 500*l.* Hall thereupon gave the manager the following delivery order:—

"Leeds, Nov. 9, 1882.

"Gentlemen,

"Please transfer to the order of the Exchange and Discount Bank, Limited, Leeds, the forty bales of Genesee sides, weighing 203 cwt. 3 qr. 23 lb., belonging to me, and being consigned from Hugh Brown & Sons, Liverpool, to my order.

"Yours truly,
"William Hall.

"The Great Northern Railway Co., Leeds."

The bank manager at once sent on this order to the railway company, who acknowledged the receipt of it, but stated that the goods had not arrived. On the 10th of November, 1882, the bank received an advice note from the railway company stating that twenty-six of the bales of leather had arrived, and were held by them to the order of the bank, and on the 13th of November, 1882, a similar advice note was received from the railway company by the bank with respect to the remaining fourteen bales. The same day the following minute was entered by the bank manager in the bank ledger, and was signed by W. Hall, and was duly stamped:—

"13th November, 1882.

"Special account—to have 500*l.* against goods represented in H. Brown & Sons' invoice the 8th of November, for 951*l.* 15*s.* 10*d.*, to be repaid 100*l.* per week, first payment to be made on the 22nd of November, 1882, and upon the whole amount and expenses being repaid, even if in a shorter time, the leather to be released, provided the regular current account is in order. Terms, interest 1 per cent. above bank rate, not falling below 5 per cent., and commission one half the amount of interest." No part of the 300*l.* was advanced until after the railway company had advised the bank that they held the forty bales of leather to their order.

The bills given by W. Hall to H. Brown & Sons in payment of the 915*l.* 15*s.* 10*d.*, were dishonoured, nor did he pay them any part of the purchase-money. On the 13th of October, 1883, he filed his petition for liquidation, and on the 30th of November, 1883, resolutions for liquidation by arrangement were duly passed, and a trustee was appointed. Shortly before the liquidation the bank sold the leather for 812*l.*, and applied the money towards payment of Hall's overdraft, which then exceeded 4000*l.*

On the 19th of July, 1884, the trustee applied to the county court judge for an order that the bank might be ordered to pay over to him the 812*l.*, on the ground that the minute of the 13th of November, 1882, and the delivery order constituted a bill of sale under the Bills of Sale Acts, 1878 and 1882, and not having been registered was void.

The county court judge held that the transaction was one within the ordinary course of business of a trader with his bankers, and consequently within the exception in s. 4 of the Bills of Sale Act, 1878, and accordingly dismissed the application. The trustee appealed.

E. C. Willis, Q.C., and *West*, for the trustee. The delivery order and memorandum in the bank ledger together constituted a bill of sale within the meaning of s. 4 of the Bills of Sale Act, 1878. It comes within the words "other assurance of personal chattels" in that section, and not being in the form prescribed by s. 9 of the Bills of Sale Act, 1882, it is void. The transaction was not within the exceptions mentioned in the 4th section of the Bills of Sale Act, 1878. It was not a transfer of goods by Hall in the ordinary course of his trade or calling. It was a disposing of raw goods, obtained on credit and never paid for, with notice to the person taking them that they were not paid for. Can such a transaction stand? If it had taken place within four months of Hall's bankruptcy it would have been a misdemeanor under the Debtors Act, 1869, s. 11, sub-s. 15, unless Hall could have shewn that he had no intention to defraud. The analogy of that Act is applicable as a test of the validity of this transaction, and the onus is on the other side to shew that it is within the exceptions contemplated by the Bills of Sale Act, 1878.

J. Linklater, and *Atkinson*, for the bank. The argument on the Debtors Act, 1869, does not apply. The goods were purchased on credit from Brown & Co. in the ordinary course of business eleven months before the bankruptcy, and no fraud of any kind has been suggested. This was an ordinary mercantile transaction of advance and pledge—a transfer in the ordinary course of business—between a banker and his customer, and is within the exceptions in the 4th section of the Bills of Sale Act, 1878. It is neither within the phraseology nor within the mischief of the Act. The document of title was the delivery order, and by virtue of that and the attornment of the railway company the bank acquired both the property and the possession in the goods. The minute in the bank ledger was merely a record of the transaction, and was not required to perfect their title, and no registration was necessary: *Woodgate* v. *Godfrey* (1); *Ex parte North Western Bank* (2); *Marsden* v. *Meadows* (3); *Reeves* v. *Barlow*. (4)

E. C. Willis, Q.C., in reply. The cases cited do not apply. Possession is immaterial if the documents require registration as a bill of sale.

Cur. adv. vult.

Dec. 3. CAVE, J. This is an appeal against a judgment of the county court judge at Leeds refusing to make an order on the respondents to pay to the trustee the proceeds of sale of some leather. The bankrupt, Hall, was formerly a boot and shoe manufacturer, and had a banking account with the Exchange and Discount Bank at Leeds. In November, 1882, this account was considerably

(1) 4 Ex. D. 59.

(2) Law Rep. 15 Eq. 69.

(3) 7 Q. B. D. 80.

(4) 11 Q. B. D. 610.

overdrawn; and Hall, who stood in need of further assistance, applied to the bank to allow him to increase his overdraft on the security of some leather which he had just purchased of Hugh Brown & Sons of Liverpool, and which he was to pay for by bills. Hall shewed the invoice of the leather to the bank manager, who was, I have no doubt, aware of the terms of the purchase. It was arranged that the bank should make an advance of 500*l.* upon the leather on a separate special account, and that the leather was not to be redeemed until Hall had not only paid back the 500*l.* but also reduced his overdrawn account within an agreed limit. When this arrangement was entered into the leather was on its way from Liverpool to Leeds, consigned to Hall's order; and Hall, by a transfer order directed to the Great Northern Railway Company, and dated the 9th of November, 1882, directed them to transfer the leather to the order of the Exchange and Discount Bank. This letter was sent by the bank manager to the Great Northern Railway Company, who, on the 10th of November, sent the bank an advice-note of part of the leather, stating that it was held to the order of the bank, and on the 13th of November sent a similar advice-note in respect of the remainder of the leather. On the same day the bank manager wrote to the railway company stating that he had advanced money on the leather, and requesting them to note that no lien could be placed against it except for warehouse rent. On the same day a minute was entered in the bank ledger, and signed by the debtor, as follows: "November 13, 1882. Special account. To have 500*l.* against goods represented in H. Brown & Sons' invoice 8th Nov. for 951*l.* 15*s.* 10*d.*, to be repaid 100*l.* per week: first payment to be made 22nd Nov., 1882; and upon the whole amount and expenses being repaid, even if in a shorter time, the leather to be released provided the regular current account is in order. Terms: Interest 1 per cent. above bank rate, not falling below 5*l.* per cent., and commission one half the amount of interest. Nov. 13th, 1882. W. Hall." This minute was entered in the margin of a new account which the bank opened with the debtor; and thereupon the debtor obtained the agreed advance of 500*l.* At the date of the debtor's petition he had not discharged his liability to the bank upon the special account; and the regular current account was overdrawn beyond the agreed amount to an extent considerably exceeding the value of the leather. The bank have since sold the leather for the net sum of 812*l.* 1*s.*; and the trustee applied to the county court judge for an order on the bank to pay over to him that sum, which order the judge refused to make.

For the trustee, it was contended that the minute of the 13th of November, 1882, was a bill of sale within the Act of 1882, and void because it was not in the form required by that Act and not registered. The substantial question is whether the Bills of Sale Act, 1882, applies to documents regulating the rights and liabilities of pledgor and pledgee, or is confined to cases where the possession of the goods dealt with by the bill of sale is intended to continue, for some time at all events, in the grantor. The Bills of Sale Act of 1854 recites that frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property; and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors. The mischief here pointed at is the false appearance of credit arising from the possession, and so apparent ownership, of property which the grantee of a bill of sale is really entitled to, and of which he has the power of taking possession. This is not the mischief which arises from a pledge; for in that case, the possession being transferred to the pledgee, the pledgor cannot get false credit from an apparent possession giving rise to a false notion of ownership. The 1st section enacts that "every bill of sale of personal chattels made after the passing of this Act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such bill of sale, or at any future time, to seize or take possession of any property and effects comprised in or made subject to such bill of sale, shall be filed," &c. Here it is to be observed that the section does not include all bills of sale, but only bills of sale whereby the grantee or holder shall have power to seize or take possession of any property comprised in the bill of sale. Now, in the case of a pledge, the essence of the transaction is that the possession is transferred at once; and the document regulating the rights and liabilities of the pledgee does not and cannot give him power to seize or take possession of the property pledged, because it is of the essence of the transaction that the pledgee shall have the possession, and if he does not get possession there is no pledge. Sect. 7 defines the meaning of the expression "bill of sale." But whatever documents are included by the definition within that expression, they must still, by force of the 1st section, be documents "whereby the grantee or holder shall have power to seize or take possession of the property comprised in or made subject to" the document. The Act of 1854 has been repealed as to bills of sale executed subsequently to the 1st of January, 1879, by the Act of 1878. This Act simply recites that it is expedient to consolidate and amend the law relating to bills of sale of personal chattels; and s. 3 enacts that the Act shall apply to every bill of sale executed on or after the 1st of January, 1879, "whereby the holder or grantee has power to seize or take possession of any personal chattels comprised in or made subject to such bill of sale." These words are to the same effect as those used in the 1st section of the Act of 1854 and cannot be enlarged by the definition contained in the 4th section. The Act of 1882 applies only to bills of sale given by way of security for the payment of money; but, subject to the exception thus created, the expression "bill of sale" has the same meaning in the Act of 1882 as in that of 1878. Sect. 7 provides that personal chattels assigned under a bill of sale shall not be liable to be seized or taken possession of by the grantee for any other than the causes therein specified. By s. 9 the bill is to be void unless made in accordance with the form in the schedule, which contains a proviso that the chattels thereby assigned shall not be liable to seizure or to be taken possession of by the grantee for any cause other than those specified in the 7th section of the Act.

There is very little authority on the subject. In *Ex parte North Western Bank* (1) there is an obiter dictum of Bacon, C.J., that a letter of hypothecation was not a bill of sale within the

(1) Law Rep. 15 Eq. 69.

Act of 1854. In *Marsden* v. *Meadows* (1) Lord Bramwell, then Bramwell, L.J., says: "The legislature has thought it right to say that as against certain persons, such as execution creditors and trustees in bankruptcy, when it is attempted to separate the ownership of goods from the possession of them, a bill of sale shall be invalid unless it has been registered." *Reeves* v. *Barlow* (2) was also cited. In that case it was held that an agreement by a clause in a building contract, that all building and other materials brought by the builder upon the land where the house was to be built should become the property of the landowner, was not a bill of sale. The ratio decidendi there appears to be that, if such building agreements were within the Act of 1878, they were so only on grounds which would have brought them within the Act of 1854, that they had been held not to be within the Act of 1854, by decisions of great weight which the Court of Appeal was not prepared to review, and, consequently, in the absence of any words in the Act of 1878 shewing that a change of the law was intended, that they must be held not to be within that Act also. But this only shews that such clauses in building agreements are sui generis and throws no light on the present question.

Apart however from authority I am satisfied on the construction of the Bills of Sale Acts that they do not include letters of hypothecation accompanying a deposit of goods by merchants or factors, or pawn tickets given by pawnbrokers, or in fact any case where the object and effect of the transaction are immediately to transfer the possession from the grantor to the grantee. In this case there was an actual transfer and possession of the leather by virtue of the transfer order sent by Hall to the railway company, and of the advice notes sent by the railway company to the bank, by which they undertook to hold the leather to the order of the bank; and, although I am of opinion that the minute of the 13th of November was intended to be a partial record of the transaction, I hold that the transaction itself was not one of those to which the Act of 1882 applies, and consequently that the minute of the 13th of November was not required to be in the form given in the schedule to the Act or to be registered. This view renders it unnecessary that I should deal with the other points raised by

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(1) 7 Q. B. D. 80.

(2) 11 Q. B. D. 609.

Mr. Linklater on behalf of the bank; but it must not be taken that I can at all assent to his proposition that a pledge by a trader of stock-in-trade which he has bought on credit and not paid for, is a transfer in the ordinary course of business of his trade or calling. The judgment of the learned county court judge must be affirmed with costs.

Solicitors for appellant: *Walker & Tweedale, Leeds.*

Solicitors for respondent: *Torr & Co., for Cousins & Cousins, Leeds.*

H. L. F.

Dec. 15.

In re HEPBURN. Ex parte SMITH.

Bankruptcy—Partnership—Deceased Partner—Trust of Real Estate to pay Debts—No Real Estate—Debts Statute-barred—Bankruptcy of continuing Partners—Proof by Executors of Deceased Partner—Rule against proving in Competition with one's own Creditors.

A devise of real estate upon trust to pay debts does not prevent the operation of the Statute of Limitations when the testator leaves no real estate to support the trust.

A., B. and C. carried on business in co-partnership. In 1875, A. retired from the firm, his share being purchased by B. and C., the continuing partners. On his retirement, A., at the request of the continuing partners, paid certain mortgage debts of the business, and took transfers to himself of these mortgage debts with the securities for the same. He also at their request lent them money on mortgage of other portions of the partnership property. He died in 1876. B. and C. continued the business until 1883, when they became bankrupt. At this time there were cash creditors of the old firm still unpaid, who carried in proofs against the joint estate of B. and C. The executors of A. also carried in a proof against the separate estates of B. and C. for (1) the balance of the purchase-money of A.'s share; (2) the mortgage debts paid off by A. on transfer to himself; (3) the moneys lent by A. on mortgage after his retirement. This proof was rejected by the trustee on the ground that to admit it would infringe against the rule forbidding a partner to prove in competition with his own creditors:—

Held, that as the debts proved by the cash creditors were, as against A.'s estate, statute-barred, the rule did not apply, and that the proof must be admitted.

This was an appeal by the executors of John Hepburn against the rejection by the trustee in liquidation of J. G. & F. Hepburn of their proof against the separate estates of the liquidating debtors under these circumstances:

Previous to 1875, John Hepburn, Thomas Hepburn, and J. G. & F. Hepburn carried on business in co-partnership under the style of J. & T. Hepburn & Sons. In February, 1875, an agreement was come to between the partners, under which John Hepburn retired from the partnership as from the 1st of February, 1875, and thenceforth the continuing partners carried on the business under the style of Hepburn & Sons until May, 1880, when Thomas Hepburn died. After his death, J. G. & F. continued to carry on the business under the style of Hepburn & Sons until the 13th of July, 1883, when they filed their petition for liquidation, under which resolutions for liquidation by arrangement were duly passed and a trustee was appointed.

Under the agreement of 1875 the share of John Hepburn in the business was taken over and purchased by the continuing partners at 81,824*l.* 16*s.* 6*d.* This sum was reduced by various payments to 35,000*l.*, which was secured by several mortgages of the real estate of the continuing partnership. These mortgages contained the usual joint and several covenants for payment of the mortgage debts and interest.

On his retirement John Hepburn, at the request of the continuing partners, paid certain debts of the firm of J. & T. Hepburn & Sons amounting in the whole to 16,691*l.*, secured by mortgages of the real estate belonging to the partnership, and took transfers of such mortgage debts and securities to W. A. Hepburn as trustee for him. These mortgages contained the usual joint and several covenants for payment of the mortgage debts.

After his retirement John Hepburn lent the continuing partners the sum of 4200*l.*, which was secured by a mortgage of certain freehold premises belonging to the then partnership, and by the joint and several covenants of the partners contained in such mortgage.

In April, 1876, John Hepburn died, having by his will devised all his real estate to J. J. Smith and W. A. Hepburn upon usual trusts for sale, with a direction that the proceeds of sale should form part of his residuary personal estate; and he bequeathed all his residuary personal estate to the said J. J. Smith and W. A. Hepburn upon the usual trusts for sale and conversion, and directed that the moneys arising from such sale and conver-

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In re Hepburn. Ex parte Smith.

sion should together with the proceeds of sale of his real estate be applied in payment of his debts and testamentary expenses; and he appointed the said J. J. Smith and W. A. Hepburn his executors. The testator left no real estate.

In February, 1878, the executors of John Hepburn lent to the then partners in Hepburn & Sons the sum of 3400*l.*, upon mortgage of freehold property of the partnership. This mortgage contained the usual joint and several covenants by the partners for payment of the mortgage debt with interest.

At the date of the liquidation there were debts of the old firm of J. & T. Hepburn & Sons remaining unpaid to the extent of 25,000*l.* for which proofs were carried in against the joint estate of the bankrupts.

In October, 1883, the executors of John Hepburn carried in a proof against the separate estates of J. G. & F. Hepburn for the 35,000*l.*, the 16,691*l.* 16*s.* 9*d.*, the 4200*l.*, and the 3400*l.*, in all 59,291*l.* 16*s.* 9*d.* This proof was rejected by the trustee on the ground that "there are still subsisting debts of the late firm of J. & T. Hepburn & Sons for which the estate of John Hepburn, who was a member of such firm, is liable, and which debts have been proved against the joint estate of J. G. Hepburn and F. Hepburn, and that to admit your proof would be to allow John Hepburn's estate to prove in competition with your own creditors."

The executors appealed.

Nov. 24. *J. Creed*, and *Dunham*, for the executors. The debts of the old firm of J. & T. Hepburn & Sons, as against John Hepburn and his estate, are statute-barred, and not one of those creditors now proving on the joint or separate estates alleges, nor does the trustee suggest, that there is now any liability on the part of John Hepburn's estate to pay those debts. The rule is that an estate "liable" shall not prove in competition with those to whom it is liable: *In re Dixon* (1); *Nanson* v. *Gordon* (2); *Ex parte Atkins* (3); Lindley on Partnership, 3rd ed. vol. ii. p. 1227; *Ex parte Grazebrook* (4); *Ex parte Thompson* (5); *Ex parte Carter* (6);

(1) Law Rep. 10 Ch. 165.
(2) 1 App. Cas. 195, 201, 207.
(3) Buck, 479.
(4) 2 D. & C. 186.
(5) 3 D. & C. 619.
(6) 2 Gl. & J. 233.

Ex parte Andrews. (1) The test in each case is the liability to pay. Therefore, where a partner is discharged by operation of the statute, he is no longer a debtor, and the rule that he shall not prove in competition with his own creditors does not apply.

Next, it will be alleged that the devise of real estate upon trust to pay debts contained in John Hepburn's will has prevented the operation of the Statute of Limitations. But John Hepburn left no real estate and therefore the trust does not take effect: *Scott* v. *Jones.* (2) Lastly, if, excluding the debt sought to be proved, there will be no surplus of the separate estate available for the joint estate, a partner is not precluded from proving in competition with the separate creditors: *Ex parte Topping* (3); *Ex parte Sheen* (4); *Lacey* v. *Hill.* (5)

Northmore Lawrence, and *S. Woolf,* for the trustee. A devise of real estate in trust for payment of debts prevents the operation of the Statute of Limitations: Shelford's Real Property Statutes, 8th ed. p. 290, and cases there cited; *Hughes* v. *Wynne* (6); Lewin on Trusts, 6th ed. pp. 454–5; and the fact that there is no real estate is immaterial. *Scott* v. *Jones* (2) does not decide the point. That was not a devise on trust to pay debts, but a charge of debts on what the testator believed to be real estate but which turned out to be personal estate. The rule against proving in competition with one's creditors is inflexible, and there is no authority for saying that it does not apply where debts are statute-barred. The statute may bar the right of action, but not the remedy: *Courtenay* v. *Williams* (7); *Stahlschmidt* v. *Lett.* (8) A partner who pays a portion of the partnership debts is never allowed to prove in competition with the creditors of the firm. He must pay all the debts. Here, a large amount of debts of the old firm remain unpaid, for which proofs have been carried in.

Finlay Knight, for creditors of the old firm.

J. Creed, in reply, referred to s. 10 of the Statute of Limitations, 1874 (37 & 38 Vict. c. 57).

Cur. adv. vult.

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(1) 25 Ch. D. 505.

(2) 4 Cl. & F. 382.

(3) 4 D. J. & S. 551.

(4) 6 Ch. D. 235.

(5) Law Rep. 8 Ch. 441, 445.

(6) T. & R. 307.

(7) 3 Hare, 539.

(8) 1 Sm. & Giff. 415.

IN RE HEPBURN. EX PARTE SMITH.

Dec. 15. CAVE, J. This is an appeal by the executors of John Hepburn against the rejection by the trustee of their proof against the separate estate of each of the bankrupts.

Previous to 1875, the testator, John Hepburn, Thomas Hepburn, and the two bankrupts, carried on business under the name of J. & T. Hepburn & Son. On the 24th of February, 1875, an agreement was made between the partners, in pursuance of which John, the testator, retired from the firm in consideration of a sum of money to be paid by the continuing partners as the purchase-money of his share. After his retirement, John Hepburn, at the request of the continuing firm, paid creditors of the old firm 16,690*l.*, in discharge of the liabilities of the old firm, against which the continuing members were bound to indemnify him. In 1876, John Hepburn died, and after his death his executors lent the then firm 3400*l.* In 1880, Thomas Hepburn died, and in 1883, the surviving partners filed a petition for liquidation.

In October, 1883, the executors of John Hepburn sent in a proof against the separate estates of the bankrupts for 59,988*l.*, composed partly of the unpaid purchase-money of John's share, in the old firm, partly of the money paid by him after his retirement to creditors of the old firm at the request of the continuing firm, and partly of money lent by the executors of John Hepburn to the continuing firm after his death. As to so much of the proof as related to money lent by John Hepburn's executors to the continuing partners after his death, it was admitted that to that extent the rejection of the proofs could not be supported. As to the residue of the proof, it was contended that the executors were not entitled to prove because there were creditors proving against the joint estate of the bankrupts in respect of debts due from the old firm of which John Hepburn was a member and which had never been discharged. It was argued that the executors might prove because John Hepburn's estate was no longer under any liability to the creditors of the old firm as their debts were barred as against John Hepburn's estate by the Statute of Limitations. To this it was answered, first, that the debts were not barred by statute because John Hepburn's will contained a trust for the payment of debts; and, secondly, that even if they were barred, that only affected the remedy by action and did not prevent the application of the rule forbidding a partner's executor to prove against the estate of the surviving partner in competition with the joint creditors. As to the first point, John Hepburn's will does in fact contain a trust for the payment of his debts out of his real estate. But John Hepburn left no real estate whatever; and it seems to me that this case falls within the principle of *Scott* v. *Jones* (1). In that case Mr. Donovan by his will charged his debts upon his real estate at Tibberton. It turned out, however, that his estate there, which he supposed to be freehold, was leasehold only; and it was held that the operation of the statute was not prevented by the charge in the will even as to that part of the personal estate which he had erroneously supposed to be realty. Now, if the charge does not affect that part of the personal estate which is erroneously supposed to be realty, how can it affect that part which is not supposed to be realty, or, in other words, how can it have any effect upon the personalty at all? I am of opinion that a charge upon the real estate, where there is no real estate, has no operation whatever, and that, apart from the Real Property Limitation Act of 1874, s. 10, the joint creditors of the old firm are barred by statute so far as John Hepburn's estate is concerned.

The remaining point as to the effect of the Statute of Limitations is, so far as I am aware, a new one. It is contended that, although the joint creditors are barred so far as any right of action against the executors of John Hepburn is concerned, yet the executors are still within the operation of the rule which forbids a co-partner or the personal representatives of a deceased partner from proving in competition with his own creditors. It is said that the statute bars the remedy but not the right, and consequently that the executors still remain indebted to the joint creditors although the latter cannot enforce their right by action. This, although not an uncommon, is in my judgment an incorrect, way of stating the effect of the Statute of Limitations. There is in law no right without a remedy; and, if all remedies for enforcing a right are gone, the right has in point of law ceased to exist. In the case of a debt the ordinary and universal remedy is by action against the debtor. There may, however, and sometimes does exist another remedy, not by action against the debtor, but arising out of the possession of property of the debtor which by law or contract may be detained by the creditor until the debt is paid. This latter remedy may exist, although the remedy by action is barred; and in that case the debt continues to exist so far as is necessary for the enforcement of this right of lien but not for enforcing the remedy by action. When the debt is barred by the statute and the creditor has no lien, the debt is gone for all purposes. This limited right is recognised in bankruptcy; and, where a creditor has a lien, he may make use of it to enforce payment of his debt, although it is statute-barred and the debtor has become bankrupt. But for the purposes of proving, the remedy by action can alone be looked at; and, if that is barred, there is no longer any right to prove, because there is no longer any right to the debt capable of being enforced by action. In this case if the joint creditors had any lien on the estate of John Hepburn, they might enforce it notwithstanding their debt is statute-barred. But they are seeking to do more than this—they are invoking the assistance of the Court, and are seeking to make use of their debt as if it still conferred upon them a right of action against the executors, so as to make them creditors of the executors in some other and further way than that of merely giving them a right to use any lien they may have on the estate of John Hepburn so as to compel payment of the debt. If they had any such lien the order I am about to make would not deprive them of it. I am of opinion that they are not creditors of the executors in any such sense as entitles them to say that the executors in proving against the separate estates of the debtors are infringing the rule against proving in competition with one's own creditors. This view renders it unnecessary that I should consider the other question raised on behalf of the appellants. The executors must be admitted to prove for the whole of their debt; and they must have their costs of this appeal out of the estate. The trustee may also take his costs out of the estate.

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(1) 4 Cl. & F. 382.

Order accordingly.

Solicitor for appellants: *H. White.*
Solicitors for trustee: *Hollams, Son & Coward.*
Solicitors for creditors: *Hepburn, Son & Cutliffe.*

H. L. F.

IN RE PAGE, BROTHERS. EX PARTE MACKAY.

1884
Dec. 15.

Bankruptcy—Practice—Disclaimer—Landlord's Notice—Trustee's Neglect—Costs—Bankruptcy Act, 1883, *s.* 55, *sub-s.* 4.

When a landlord gives a trustee notice under sub-s. 4 of the 55th section of the Bankruptcy Act, 1883, requiring him to decide whether he will disclaim or not the bankrupt's leaseholds, and the trustee declines or neglects within the twenty-eight days limited by the sub-section to give notice whether he disclaims or not, and subsequently applies to the Court for leave to disclaim, he may render himself personally liable to the payment of rent and costs.

THIS was an application by R. Mackay, the trustee in bankruptcy of Messrs. Page Brothers, for leave to disclaim the leasehold premises where the bankrupts had carried on business. The premises were held from C. J. Carr, under a lease dated the 21st of July, 1882, for a term of sixteen years at a rental of 100*l.* a year.

R. Mackay was appointed trustee of the bankrupt's estate on the 11th of October, 1884, and on the 5th of November he was served by C. J. Carr with a written notice under sub-s. 4 of the 55th section of the Bankruptcy Act, 1883, requiring him within twenty-eight days to decide whether he would or not disclaim his interest as trustee in the said lease. The premises were much out of repair and had remained unoccupied since the commencement of the bankruptcy.

The trustee did not reply to this notice, but on the 6th of December he served C. J. Carr with a notice of motion for leave to disclaim.

F. C. Willis, for the motion.

H. Reed, for the landlord. Although the trustee's notice of motion is dated the 15th of November, it was not served upon the landlord until the 6th of December. The trustee had no right to act in such an irregular and off-handed manner. If he intended to disclaim he ought, on receiving the landlord's notice, to have given up possession at once and to have disclaimed within the twenty-eight days, not having done so, he cannot now disclaim, or, if he is permitted to do so, he must pay compensation

The landlord is entitled to rent from the 11th of October to the 5th of November, the date of his notice, and costs.

F. C. Willis, in reply. There has been no intentional disregard of the landlord's notice. The trustee's notice of motion was taken out in response to the landlord's notice, but was not served until the 6th of December, through inadvertence. The bankrupts have absconded, and the trustee has been placed in a very difficult position. He has no information about the estate, and very probably there will be none. He has endeavoured to sell the premises. It is not a case for compensation, but if any is given there should be the usual order for payment out of the estate.

Cave, J. There will be leave to the trustee to disclaim within a week; but he must pay a month's rent and the landlord's costs of this application. The order will be that the trustee pay these amounts personally—not out of the estate—for he is in default. He has proceeded in a most irregular manner.

Order accordingly.

Solicitors for trustee: *Jackson & Evans.*
Solicitors for landlord: *Yeo & Co.*

H. L. F.

Dec. 15.

In re CHUDLEY. Ex parte BOARD OF TRADE.

Bankruptcy—Liquidation by Arrangement—Release and Discharge of Trustee—Power of Board of Trade to require Account—Bankruptcy Act, 1869, *s.* 126—*Bankruptcy Act*, 1883, *s.* 102, *sub-s.* 5, *s.* 162, *sub-s.* 2.

A trustee under the Bankruptcy Act, 1869, who has obtained his statutory release and discharge under that Act, after the 25th of August, 1883 (the date of the passing of the Bankruptcy Act, 1883), is not thereby relieved from rendering an account to the Board of Trade of his receipts and payments as such trustee if, on that date, he had in his hands any undistributed funds, although such funds may have been disposed of by a subsequent resolution of the creditors.

In 1874 S. Chudley filed his petition for liquidation under the Bankruptcy Act, 1869. His creditors duly passed resolutions for liquidation by arrangement, and appointed W. Cooper the trustee under the liquidation. A dividend was subsequently paid to the creditors, but for more than two years prior to the 25th of August, 1883 (the date of the passing of the Bankruptcy Act, 1883), a sum of 75*l.* 17*s.* 8*d.* had remained in his hands undealt with and undistributed.

On the 3rd of October, 1883, a meeting of the creditors was held, when by a statutory majority the accounts of W. Cooper as trustee were audited, passed, and allowed, and special resolutions were duly passed closing the liquidation, voting him the sum of 75*l.* 17*s.* 8*d.* for his remuneration, and granting him his discharge as from the 31st of October, 1883. These resolutions were duly registered.

On the 15th of July, 1884, the Board of Trade served W. Cooper with an order under sub-s. 2 of s. 162 of the Bankruptcy Act, 1883, requiring him to render an account of his receipts and payments as trustee, which not having been complied with, they moved to enforce the order.

Bothamley, for the motion.

Yate Lee, for the trustee. The 162nd section does not apply to this case. This liquidation was duly closed, and the trustee released under sub-ss. 7 and 9 of s. 126 of the Bankruptcy Act, 1869, and as from the date when the special resolutions were passed he was by virtue of s. 53 of that Act discharged from all liability in respect of any act done or default made by him in the administration of the debtor's estate. That being so, there must be clear words in the new Act to deprive him of that statutory discharge. Now the 162nd section of the new Act deals with "unclaimed or undistributed funds." Here there are no such funds; and the governing words in sub-s. 2 (*a*) are a trustee "empowered to collect, receive, or distribute" any funds. Here, as from the 3rd of October, 1883, the trustee was functus officio, and was not a person "empowered to collect, receive, or distribute" any funds, although, no doubt, he had some funds in his hands at the date of the passing of the Act. The Board of Trade are not claiming any undistributed fund, but an account. Under sub-s. 2 (*b*), however, they can only require an account from "such trustee." Those words throw us back on sub-s. 2 (*a*), which shews that "such trustee" means a trustee "empowered to collect, receive or distribute," but at the time the Board of Trade made their application Mr. Cooper was not such a trustee, and there is nothing in the Act that can deprive him of the statutory discharge he has properly obtained under the late Act.

Bothamley, in reply, was not called on.

Cave, J. In my opinion this case is clearly within the words of the Act of Parliament. Sect. 162, sub-s. 2 (*a*), provides—omitting the parts of the section which are not material—that a trustee empowered to collect, receive, or distribute funds under a petition presented in pursuance of the Act of 1869, who on the 25th of August, 1883, has had in his hands undistributed funds for two years after the receipt thereof must pay that amount into the Bankruptcy Estates Account.

Now Mr. Chudley was a trustee empowered to collect, receive, and distribute funds under this liquidation, which was instituted under the Bankruptcy Act of 1869; and on the 25th of August, 1883, he had in his hands the sum of 75*l.* 17*s.* 8*d.*, which was undistributed, and which he had had in his hands for considerably over two years. He was, therefore, bound under this section to pay it into the Bankruptcy Estates Account. He did not do so; but he called together the creditors, and got them to pass a resolution, whereby that amount was voted to him for his remuneration, and his accounts were approved and passed and allowed. That, however, unfortunately for him, was only an unavailing attempt to get out of the Act. Sub-s. 2 (*b*) of the 162nd section provides that the Board of Trade may at any time order any such trustee to submit to them an account. Now what is the meaning of the words "such trustee"? They mean a trustee who, being empowered to collect, receive, and distribute funds under a petition in pursuance of the Act of 1869, has on the 25th of August, 1883, in his hands undistributed funds which he has had for two years. That is exactly the position in which Mr. Chudley now finds himself, or did find himself on the 25th of August last; and I am therefore clearly of opinion that he falls within the words as well as within the intention of s. 162. I must order that he shall within three weeks submit to the Board of Trade an account verified by affidavit of the sums received and paid by him under this liquidation under which he was acting as trustee.

Order accordingly.

Solicitors: *R. Munton*; *Hindson, Miller, & Vernon.*

H. L. F.

In re PARKER and PARKER (1). Ex parte TURQUAND.

Nov. 24.

Bankruptcy—Disclaimer of Leaseholds—Mortgagee—Superior Landlord—Form of Order—Bankruptcy Act, 1883, *s.* 55, *sub-s.* 6.

On a disclaimer of leaseholds by a trustee in bankruptcy under sub-s. 6, s. 55, of the Bankruptcy Act, 1883, the landlord has not such an interest in the "disclaimed property" as to be entitled to a vesting order under the sub-section.

The right to a vesting order is only conferred on a person claiming an interest in the property through or under the bankrupt.

Where in such a case a mortgagee does not appear on the trustee's application to disclaim, the proper course is to order that the mortgagee be excluded from all interest in and security upon the property, unless he shall by a short date declare his option to take a vesting order in the terms of the sub-section.

The bankrupts, Messrs. F. & W. Parker, were mortgagees in fee of Fisher's Hotel, in Clifford Street, Bond Street, and in 1879 they sub-mortgaged the hotel to their bankers, Messrs. Coutts & Co., for a large amount.

In July, 1881, they acquired a sub-lease of the hotel for nine and a quarter years from the Baron de Almeida, who held the premises under a long lease from the freeholder, and in July, 1882, they entered into an agreement with a M. Imperiali to let the premises to him for a term of years, with the option to purchase the fee. The Baron de Almeida was a party to this agreement.

In March, 1884, the Messrs. Parker were adjudicated bankrupts, and Messrs. Turquand and Whinney were appointed trustees.

On the 25th of July the trustees obtained an extension of six months within which to decide whether they would disclaim the bankrupts' interest in the above property, and they now applied for leave to disclaim it.

Messrs. Coutts & Co., the sub-mortgagees, were served with the notice of motion, and also with a notice by the superior landlord that he intended on the hearing of the motion to apply for a vesting order, but they did not appear.

E. C. Willis, Q.C., and *J. Linklater*, for the trustees.

Vaughan Williams, for M. Imperiali, asked that the leave to disclaim should be granted without prejudice to his right to prove for any injury caused to him by the disclaimer.

F. C. Willis, for the superior landlord, the Baron de Almeida, asked for a vesting order under the 6th sub-section of the 55th section of the Bankruptcy Act, 1883.

[Cave, J. Does the 6th sub-section apply to a landlord? The words are "any interest in any disclaimed property," and apparently apply to the interest of the bankrupt, and those claiming under him, in the property to be disclaimed.]

The sub-section is wide enough, and extends to "any person claiming any interest" in the disclaimed property. Those words include a landlord, for he has an interest in the lease so far as the payment of the rent and observance of the covenants are concerned, and a mortgagee can only come in subject to undertaking the burthen and liabilities of the lease. The mortgagees should be excluded unless they will take a vesting order. They have had full notice of this application, and if they intend to claim any interest in the property, they should now assert it and take a vesting order.

Cave, J. I am not sure that the landlord is entitled to a vesting order under this sub-section. I do not think that the words "any person claiming any interest in any disclaimed property" apply to a landlord. What is to be disclaimed? A term of years—not the fee simple. And in respect of what property is the vesting order to be made? "Any disclaimed property," that is, property of the bankrupt vested in the trustee, and which he has disclaimed or is about to disclaim. Here the property to be disclaimed is a term of years; and the landlord has no interest in that, although no doubt he has an interest in the reversion. The Act, moreover, does not say "any property affected by the disclaimer," but "any disclaimed property," and restricts, in my

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opinion, the operation of the sub-section to the interest of the bankrupt and those claiming under him. I do not think, therefore, that it applies to the property out of which the bankrupt's interest is carved.

There will be leave to disclaim, with liberty to the superior landlord and M. Imperiali to prove for any loss or damage they may have sustained by reason of the disclaimer. As to the sub-mortgagees, I think the proper course will be to order that they shall be excluded from all interest in and security upon the disclaimed property, unless they shall within a week declare their option to take a vesting order in the terms of the sub-section. The costs of all parties will come out of the estate.

Order accordingly.

Solicitors for trustees: *Linklaters.*
Solicitors for M. Imperiali: *Reyroux, Phillips, & Co.*
Solicitors for superior landlord: *H. Montagu.*
Solicitors for Messrs. Coutts & Co.: *Farrer, Ouvry, & Co.*

H. L. F.

IN RE PARKER & PARKER (2). EX PARTE TURQUAND.

Dec. 16.

Bankruptcy—Official Receiver—His Powers and Duties—Power of Sale—Bankruptcy Act, 1883, ss. 9, 10, 21, 54, 56, 68–70.

After an adjudication and pending the appointment of a trustee by the creditors, the official receiver, although he is "the trustee for the purposes of the Act," has no power, mero motu, to sell the bankrupt's property; but his powers and duties are under s. 70 of the Act limited to those of a receiver and manager appointed by the High Court.

Whether he could sell by virtue of an order of the Board of Trade under sub-s. 2 of s. 70, *quære.*

ON the 6th of March, 1884, a bankruptcy petition was presented against F. S. Parker and W. S. Parker, co-partners and solicitors, and on the 13th of March a receiving order was made.

On the 15th of March the official receiver appointed Messrs. Turquand & Whinney special managers of the joint estate of the debtors, but no special managers were appointed in respect of the separate estate.

On the 20th of March the debtors were adjudicated bankrupt.

On the 2nd of April the furniture and effects of F. S. Parker were, by the direction of the official receiver, sold by public auction and realised 2065*l.* 2*s.* 4*d.*; and on the 7th of April the furniture and effects of W. S. Parker were in like manner sold by public auction and realised 3518*l.* 13*s.* 4*d.* The total amount of the costs and expenses and commissions claimed in respect of these sales as payable out of the bankrupt's estate amounted to 841*l.* 15*s.* 1*d.*, of which the sum of 335*l.* 0*s.* 7*d.* represented the fees and percentage receivable by the Board of Trade from the chief official receiver under Table D.

On the 18th of April the creditors held their first meeting, and appointed Messrs. Turquand & Whinney the trustees in the bankruptcy; and on the 6th of May a committee of inspection was chosen.

On the 1st of July the trustees, acting under the direction of the committee of inspection, applied to the Board of Trade to refund the 335*l.* 0*s.* 7*d.* on the ground that having regard to the provisions of s. 70 of the Bankruptcy Act, 1883, the sales were irregular. This was refused, and thereupon the trustees applied to the Court for an order declaring that the sales in question were irregular and unauthorized by the Bankruptcy Act, 1883, and that the expenses, commissions, and fees claimed against the estate in respect of such sales, amounting to 841*l.* 15*s.* 1*d.*, be disallowed, and that the Board of Trade be ordered to pay or refund to the trustees the 335*l.* 0*s.* 7*d.* retained by them as the fee or percentage under Table D.

A. Charles, Q.C., and *J. Linklater*, for the trustees. Although the Bankruptcy Act, 1883, vests the debtor's estate in the official receiver until the appointment of the creditors' trustee, it does not confer upon him all the powers which the creditors' trustee when appointed possesses. The official receiver as such springs into existence on the making of the receiving order under s. 9, although he can by s. 10 be appointed interim receiver of the debtor's property before the receiving order is made. But on the receiving order being made he is "thereby constituted the receiver of the property of the debtor." Then s. 12 empowers the official receiver to appoint a special manager. That power was acted on in this case, so that at the date of the adjudication there was a special manager, and he existed until the creditors' trustees were appointed. Sect. 21 provides for the appointment of a trustee by the creditors, and sub-s. 5 enacts "the official receiver shall not, save as by this Act provided, be the trustee of the bankrupt's property." Then s. 54 says that until a trustee is appointed—that must mean a creditors' trustee—"the official receiver shall be the trustee for the purposes of this Act;" and s. 56 defines the powers of a trustee, which include a power of sale. But the status and duties of the official receiver are prescribed by ss. 68–70, and by s. 70 his powers and duties are cut down and limited to those of a receiver and manager appointed by the High Court, and there is nothing in any subsequent section of the Act or in the rules which enlarges his powers and duties as here defined, except in the case of small bankruptcies: s. 121; and the powers conferred on him by s. 70 do not authorize him to sell the debtor's property. No doubt under sub-s. 2 of s. 70 he may incur expense for the protection of the debtor's property and the disposing of perishable goods, but the sub-section, taken as a whole, negatives the very idea of the official receiver parting with the property of the debtor before any of the creditors, or their trustee, or the committee of inspection have had their say on the matter. Further, in this case the official receiver could not have sold even under an order of the Board of Trade, because s. 70 says expressly that he is only to have the same powers as a receiver and manager of the High Court. If he could, then the conclusion is that you have an official springing into existence on the making of the receiving order who can by the direction of the Board of Trade realise the debtor's estate at once, and thus render nugatory all those elaborate sections in the Act providing for a composition, a scheme of arrangement, and the working out of the estate under the direction of the creditors.

Sir F. Herschell, S.G., and *Muir Mackenzie*, for the official receiver. The official receiver in his capacity as trustee had power to sell this property as and when he did, and without the order of the Board of Trade. By s. 54 of the Act he is made "trustee for the purposes of this Act." It is impossible to conceive wider words than those. They mean for *all* the purposes of the Act, and when the official receiver is made "trustee for the purposes of this Act," it means he shall be able to do what the Act says a trustee is able to do. That is to say, that, on the plain construction of the Act, wherever a power is given to a trustee in this Act, that power may be exercised by the official receiver when acting as trustee, except where the context shews (and there are some such provisions) that it is only intended to be exercised by the trustee appointed by the creditors. There is a broad line drawn by the Act at adjudication. Before that, the official receiver is a receiver with the duties of a receiver, the functions of a receiver, and the obligations of a receiver, but after adjudication he is, though still in a sense the official receiver, a trustee in addition and outside that altogether, and he has then the powers and duties of a trustee under the Act; and on adjudication the property vests in the official receiver as trustee and becomes divisible amongst the creditors. Then in s. 56, "subject to the provisions of this Act the trustee" may do certain things. It is not the trustee appointed by the creditors, but "the trustee," which includes the official receiver, and one of those things is the sale of the bankrupt's property. There is nothing in that section to cut down or limit the expression "the trustee" as there used, and why should it not apply as much to the official receiver when created trustee for the purposes of the Act under s. 54 as to any other trustee? Then the 70th section deals with the duties of the official receiver, as receiver, quite apart from and independent of his duties as trustee. Down to this part of the Act he is made, after adjudication, a trustee for the purposes of the Act, but his duties, before the adjudication and during the time there is no trustee, have remained unprovided for, and the 70th section defines those duties. There is nothing in it to cut down the power of the trustee, though that trustee may be the official receiver, under the previous sections. The section limits the duties and obligations of the official receiver as receiver; but, after adjudication, he holds a dual office. He is the trustee as well, and has the functions of the trustee. The bankrupt's property is vested in him as trustee under the Act, and he has a power of sale, and in respect to that he does not require the sanction of the Board of Trade.

A. Charles, Q.C., in reply.

CAVE, J. This is a case of some little importance; but, as I have formed a clear opinion upon it, I do not know that I shall gain anything by taking further time to consider what my judgment shall be. Now the allegation on the part of the appellants is that this was a sale not within the power of the official receiver; and it is alleged not to be within his power upon two grounds. First, that it is not within his power at all under any circumstances; and, secondly, that at any rate it is not within his power without the consent of the Board of Trade, which in this case has not been obtained. Whether or not the consent of the Board of Trade would validate a sale is a question, therefore, which I need not determine in this case. But I must determine, as far as I am able, whether the official receiver has power to sell without that consent. The first section to which it is material to refer is s. 54, which enacts that "until a trustee is appointed"—and by "trustee" there clearly must be meant a "creditors' trustee," that is, a trustee appointed by creditors—"the official receiver shall be the trustee for the purposes of this Act, and immediately on a debtor being adjudged a bankrupt, the property of the bankrupt shall vest in the trustee." Now, in addition to the official receiver being made, as he is by s. 9, receiver of the property of the debtor, upon the making of the receiving order, he is, by this s. 54, made a "trustee for the purposes of this Act," until a trustee is appointed; and, upon the debtor being adjudged a bankrupt, the property of the bankrupt is vested in the trustee, that is, in the official receiver. Now I am of opinion that, if those sections stood alone, I should be bound to read the words "for the purposes of this Act," as meaning "for all the purposes of this Act," and that I could not cut down the power of the official receiver during the time that he was authorized to act as trustee, unless I could find something in the Act intimating that he was to have less authority than the authority of the creditors' trustee. The next important section is s. 56, which enacts that "subject to the provisions of this Act the trustee may do all or any of the following things: sell all or any part of the property of the bankrupt," and so on. Reading that along with s. 54 it seems to me clear that the effect of the two, when taken together, is that the official receiver, so long as he is trustee, may, "subject to the provisions of this Act," sell all or any of the property. But, again, there are the words "subject to the provisions of this Act;" and I have to go further and see whether the authority which is thereby given to the receiver is at all cut down by the subsequent sections of the Act. Then I come to s. 68; and s. 68 puts the previous sections which I have read in, if anything, a still clearer light. It is in that part of the Act which is headed "official receivers," and purports to deal with their status and duties as such. The section begins, "The duties of the official receiver shall have relation both to the conduct of the debtor and to the administration of his estate." Then sub-s. 3 says: "All expressions referring to the trustee under a bankruptcy shall, unless the context otherwise requires or the Act otherwise provides, include the official receiver when acting as trustee." That, as I have said, makes the provisions of s. 56 still clearer; because, by virtue of s. 68, s. 56 must be read as if it ran in this way, "Subject to the provisions of this Act the trustee, or the official receiver when acting as trustee, may sell all or any part of the property of the bankrupt;" and, if the matter stood there, to my mind at all events, it would be perfectly clear that the official receiver, when acting as trustee, would have during his tenure of the office the same power of selling that the creditors' trustee would have during his tenure of that office. Then come ss. 69 and 70, which purport to define the duties of the official receiver as they have relation to the conduct of the debtor, and as they have relation to the administration of the debtor's estate; s. 69 deals with his duty as regards the debtor, and s. 70 with his duty as regards the debtor's estate. The 1st sub-section of s. 70 provides that "pending the appointment of a trustee" it shall be the duty of the official receiver to act as interim receiver of the debtor's estate, and as manager thereof—I leave out the words about special manager—to do certain things. Now there it seems to me quite plain that the words "pending the appointment of a trustee" must mean pending the appointment of a trustee by the creditors, because when one turns back to s. 54 the very same expression is used under circumstances which shew clearly that creditors' trustee is meant.

Sect. 54 says that "until a trustee is appointed the official receiver shall be the trustee." Now until a trustee is appointed there clearly means a trustee appointed either by the creditors or, on their failure, by the Board of Trade; and I think that when I come to s. 70 I must read the words "pending the appointment of a trustee" in exactly the same sense, and that that section, therefore, does purport to deal with the duties of the official receiver, not only up to the time of the adjudication but subsequently, and until, by reason of the appointment of a trustee by the creditors, he ceases to be trustee. Then follow his duties. He is "to act as interim receiver of the debtor's estate, and, where a special manager is not appointed, as manager thereof." These expressions are somewhat obscure, and, consequently, in sub-s. 2 they are further explained: "for the purpose of his duties of interim receiver or manager the official receiver shall have the same powers as if he were a receiver and manager appointed by the High Court." Those are consequently the duties which he has to perform as regards the estate of the debtor down to the appointment of a trustee by the creditors. He is to have the same powers as if he were a receiver and manager appointed by the High Court. Consequently, as it seems to me, we have here, within the meaning of s. 56, "the provisions of this Act," subject to which that section is to be read; and we have within the meaning of s. 68 "the Act otherwise providing," and modifying the general power given by s. 56. Then what are the powers of a receiver and manager appointed by the High Court? It has not been suggested that a receiver or manager appointed by the High Court can sell the property. The section goes on to say that "as far as practicable" the official receiver is to "consult the creditors with reference to the management of the debtor's property." It would seem rather strange that he should be bound to consult them with regard to a comparatively minor matter, such as the management, when no provision at all is made for his consulting them if he intends to sell. He "may for that purpose, if he thinks it advisable, summon meetings of the persons claiming to be creditors;" and then comes another important provision which says that "he shall not"—that is, he shall not for the purposes of his duties as receiver and manager, which are to last down to the time of the appointment of the creditors' trustee—"unless the Board of Trade otherwise order, incur any expense beyond such as is requisite for the protection of the debtor's property or the disposing of perishable goods." Now, I must say, I cannot help looking at those expressions as being most precise and clear limitations of the authority which otherwise, under the 56th section, he would have. The Act says, to my mind as clearly as can be said, that he shall not for the purpose of his duty as receiver and manager—which duty, as I have said, lasts down to the time of the appointment of the creditors' trustee—incur any expense beyond such as is requisite for the protection of the debtor's property or the disposing of perishable goods unless the Board of Trade orders. I think that I cannot, without doing violence to the Act, hold that the official receiver in this case had authority to incur the expense which is necessarily involved in the sale of the bankrupt's property; and I am, therefore, compelled to come to the conclusion that this sale was not authorized by the Act. Now, I have been invited to decide the question of whether or not the order of the Board of Trade would justify the sale; but that I decline to do. It does not arise in the present case; and, although it is undoubtedly a very important point, I prefer to leave it for decision in some case where it actually arises. In this case I shall confine myself to what is actually in dispute; and I must, in accordance with what seems to me the meaning of the Act, hold that this sale by the official receiver was not authorized by the Act. If that is so, what ought to be done with reference to the expenses which have been incurred? Now it has not been suggested that any expense has been incurred by the official receiver which would not have been incurred by the trustee if the sale had been put off until the trustee had been appointed. No charge at all has been made against the bona fides and honesty of the official receiver. What is said is that he made a mistake with regard to the powers which the Act conferred upon him. I think, therefore, that all the expenses which have been incurred in the sale of the goods, that is to say, the expenses of the auctioneer and all other expenses of that kind, should be allowed; and with reference to the percentage, inasmuch as that is something which has been deducted from the estate, and inasmuch as the estate

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has gained nothing that I can see in return for that deduction, I must order that the amount of the percentage should be returned to the trustee. With regard to the costs, the point is quite a new one, and I am satisfied that it has been raised in perfect bona fides and in an honest belief on the part of those who raised it that the official receiver was justified in doing what he has done. The trustee, of course, has only done his duty in bringing the matter before the Court, and I think the proper order to make is, that the trustee shall have his costs out of the estate, and to make no order with reference to the costs of the Board of Trade.

Solicitors for trustees: *Linklaters & Co.*

Solicitor for the Board of Trade: *R. Munton.*

H. L. F.

Dec. 19.

[IN THE COURT OF APPEAL.]

EX PARTE EDWARDS. IN RE TOLLEMACHE.

Bankruptcy—Proof of Debt—Evidence—Admissibility—Admission by Dead Man against Interest—Bankrupt's Statement of Affairs—Judgment Debt—Inquiry into Consideration.

In order that an admission made by a dead man may be admissible in evidence on the ground that it was against his interest, it must have been actually against his interest at the time when it was made; it is not sufficient that it might possibly turn out afterwards to have been against his interest.

An admission made by a bankrupt in his statement of affairs that a debt is due from him, is not after his death admissible evidence as against his assignee in bankruptcy of the existence of the debt, merely because it might turn out that there was a surplus after paying the creditors.

APPLICATION for leave to appeal to the House of Lords from the decision of the Court of Appeal (Baggallay, Cotton, and Lindley, L.JJ.) in *Ex parte Revell, In re Tollemache* (No. 1) (1), where the facts are fully stated. It is stated in that report that leave to appeal was refused by the Court. This was an error. The application was not absolutely refused; it was postponed until after the hearing of some other appeals in the same bankruptcy, the facts of which were somewhat similar to those of the present case.

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(1) 13 Q. B. D. 720.

Bigham, Q.C., and *H. Reed*, for the applicant. The applicant ought at any rate to be allowed to prove for the amount which the bankrupt in his statement of affairs admitted to be due to the applicant's testator. That statement by the bankrupt was an admission against his interest, because it might turn out that there would be a surplus after paying the creditors. Therefore, the statement is admissible evidence. The amount at stake is large, and questions of principle are involved, one being that the Court ought not to go behind the judgment.

Winslow, Q.C., and *Yate Lee*, for the assignees, were not heard.

Brett, M.R. I may venture to say—perhaps I am obliged to say—that the judgment of the Court of Appeal is so clearly right that leave to appeal from it ought not to be given. There is no pretence for saying that the Court of Bankruptcy has no power to go behind a judgment; it has been laid down over and over again that it has. If ever there was a case of suspicion as to the circumstances under which a judgment was obtained, the present case is full of suspicion.

As to the other point, it is said that the bankrupt's statement was an admission against his interest made by a man who has since died. This is an attempt to enlarge the rules as to the admissibility in evidence of admissions against interest. The rule is, that an admission which is against the interest of the person who makes it, at the time when he makes it, is admissible; not that an admission which may or may not turn out at some subsequent time to have been against his interest is admissible. This statement does not, therefore, fall within the recognised rule.

Cotton, L.J. In my opinion, leave to appeal ought not to be given. There is not any doubtful question of law raised, and the case is full of suspicion.

Lindley, L.J. I do not think there ought to be an appeal. I adhere to the view which I expressed on the former occasion.

If the judgment had been a recent one it would have been the bounden duty of the trustee to investigate it. If my recollection is right, we did not absolutely refuse leave to appeal, because we were told that a difficult question might arise in some other cases in this bankruptcy, in which there was nothing suspicious about the judgment, viz., whether a creditor could be allowed to prove on a judgment after the lapse of nearly forty years, and when the consideration for the judgment could not be ascertained. But it turned out that that point did not really arise in any of the other cases; in all of them there were some special circumstances which excluded any such question of difficulty.

Solicitor for applicant: *M. T. Hodding.*
Solicitors for assignees: *Still & Son.*

W. L. C.

[IN THE COURT OF APPEAL.]

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Jan. 16.

Ex parte SIBETH. In re SIBETH.

Bankruptcy—Property passing to Trustee—Reputed Ownership—Wife's Separate Property in Possession of Husband—Marriage Settlement made in Foreign Country.

The rule that a husband is a trustee for his wife of her separate property when no other trustee has been appointed, applies to that which becomes her separate property by virtue of a marriage contract entered into in a foreign country.

When, therefore, such property is in the possession of a husband at the commencement of his bankruptcy it does not pass to his trustee.

Appeal from the refusal by Mr. Registrar Pepys of an application by the wife of W. E. Sibeth, a liquidating debtor, that certain articles which were in the possession or control of the debtor at the commencement of the liquidation might be delivered up to her by the trustee, as being her separate property. The registrar refused the application, on the ground that the articles were at the commencement of the liquidation in the order or disposition of the debtor as reputed owner. The debtor, who was a domiciled Englishman, married his wife, who was a Prussian subject, at Cologne, on the 12th of February, 1846. On the 9th of February, 1846, a marriage contract, in the form used under the Code Napoléon, which was in force in the Rhenish provinces of Prussia, was executed by the intended husband and wife. It was admitted in writing by the trustee in the liquidation, for the

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purposes of the application, that by the Prussian law the effect of the marriage contract was that the wife became entitled for her separate use to all real and personal property belonging to her at the time of the marriage, and that all property which accrued to her after the marriage by donation or inheritance became her separate property, and stood on the same basis as the property mentioned in the marriage contract. It was also admitted that the articles in question, so far as they were identified, were subject to the contract, and were separate estate of the wife. By the opinion of a French advocate, it appeared that the administration of the wife's separate property belonged, under the Code Napoléon, to the husband. No trustee of the wife's separate property was appointed by the marriage contract. On the 9th of October, 1883, the husband, who was a trader in England, filed a liquidation petition in the London Bankruptcy Court. The wife appealed from the registrar's decision.

Winslow, Q.C., and *G. W. Lawrance*, for the appellant. Under the Prussian law the husband, by virtue of the marriage contract, is administrator of his wife's separate property, and this character, being a matter of contract, followed him into this country. He stood, therefore, in the position of a trustee of his wife's separate property, and the doctrine of reputed ownership does not apply. He, as trustee, was the true legal owner of the property. The Prussian law operating on the contract placed the husband in this position.

[Cotton, L.J. If the property is settled to the separate use of the wife and no trustee is appointed, then by the law of this country the husband is trustee for the wife. You do not need the assistance of the Prussian law at all.]

Sidney Woolf, and *F. M. Abrahams*, for the trustee. The question is whether the English law can be applied to a case in which the property became the separate property of the wife by virtue of a contract made in a foreign country.

Brett, M.R. The law is perfectly plain. The marriage contract was made in Prussia, and it must be construed according to the law of Prussia. It is admitted that, when the contract is construed according to that law, the effect of it is to give the wife's property to her for her separate use. Then the husband has become bankrupt in England, and we must apply the English law in order to determine what property passes to his trustee. It is said that these articles pass to the trustee, because they were in the husband's possession at the commencement of the bankruptcy. But, by the law of England, a husband is a trustee for his wife of her separate property, if there is no other trustee, and property which is in the possession of a bankrupt as trustee does not pass to his trustee in bankruptcy. The appeal must be allowed with costs.

Cotton and Lindley, L.JJ., concurred.

Solicitor for wife: *Alfred Howard.*
Solicitors for trustee: *M. Abrahams, Son, & Co.*

W. L. C.

[IN THE COURT OF APPEAL.]

March 6.

Ex parte WHITEHEAD. In re WHITEHEAD.

Bankruptcy—Husband and Wife—Wife's Chose in Action—Ante-nuptial Parol Agreement to settle—Part Performance—Statute of Frauds, s. 4—Gift by Husband to Wife—Bankruptcy of Husband—Title of Trustee.

On a marriage it was verbally agreed between the husband and the wife that a sum of money standing to the credit of the wife on deposit at a bank in her maiden name should be her separate property. Nothing further was done; but after the marriage the money, with the husband's consent, remained at the bank in the wife's maiden name; and she received the interest on it for two years after the marriage, when she drew the money out of the bank. The trustee in the subsequent liquidation of the husband having claimed payment of the money from the wife as part of her husband's property:—

Held, by Cave, J., that there had been no such part performance by the husband of the parol contract to settle as to take the case out of the Statute of Frauds, and, therefore, that the trustee was entitled to the money subject to the wife's equity to a settlement, if any.

Held, by the Court of Appeal, without deciding the question on the Statute of Frauds, that there had been a gift of the money by the husband to the wife after the marriage; that he had become a trustee of it for her as her separate property; and that, consequently, it did not pass to the trustee in his liquidation.

This was an appeal from a decision of the county court judge at Leeds.

In September, 1879, Mr. Whitehead married Harriet Milner, who was then entitled to property, both real and personal. The real property was duly settled upon her by deed. The personal property, which consisted of a sum of 1400*l.* standing to her credit on deposit at her bankers in her maiden name, was not included in the settlement; but by a parol ante-nuptial agreement between Mr. and Mrs. Whitehead it was agreed that she should retain this sum of money for her separate use. The money, however, was not transferred to trustees for Mrs. Whitehead, and nothing was done to carry out the agreement except that, after the marriage, the money remained in the bank to the credit of Mrs. Whitehead in her maiden name, and she always received the interest on it from the bank with her husband's knowledge and consent, and on one occasion drew out 50*l.* of the principal.

After two years Mr. and Mrs. Whitehead separated by mutual consent, and on the 24th of March, 1882, Mr. Whitehead's solicitor called at the bank and inquired after the money, and on the 28th of March, 1882, served on the bank a written notice that the money was not to be paid out to the order of any other person than Mr. Whitehead, but was informed in reply that on the preceding day Mrs. Whitehead had drawn out the whole of the £1350 standing to her credit at the bank. On the 29th of November, 1883, Mr. Whitehead filed his petition for liquidation.

An application by the trustee in the liquidation to the county court judge for a declaration that he was entitled to the 1350*l.*, on the ground that it was a chose in action to which Mr. Whitehead jure mariti was entitled, having been refused, the trustee appealed.

Nov. 11. *Cooper Willis, Q.C.*, and *Warrington*, for the appellant. The ante-nuptial parol agreement is void under the Statute of Frauds unless it can be supported by some act of part performance by the husband. The onus is on the respondent to prove this. The husband's mere recognition of his wife's rights and his acquiescence in her receipt of the interest is insufficient. *Simmons* v. *Simmons* (1); *Mews* v. *Mews* (2). There must be some positive act on his part estopping him from now asserting his title.

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(1) 6 Hare, 352.

(2) 15 Beav. 529.

Warmington, Q.C., and *Finlay Knight*, for the wife. All that was necessary to support this agreement was an unequivocal, complete, and final demonstration by the husband of his intention not to interfere with his wife's rights: *Parker* v. *Lechmere* (1); *Whittaker* v. *Whittaker* (2). Here there is strong evidence of such an intention. The ratio decidendi in *Simmons* v. *Simmons* (3) is in the wife's favour. There the husband was to do something. Here, the agreement was to do nothing, and, so far as there could be part performance of such an agreement, it consisted in the husband remaining quiet.

Cooper Willis, Q.C., in reply.

Cur. adv. vult.

Nov. 24. Cave, J. (after stating the facts, continued :—) It was contended that this parol agreement was void according to the Statute of Frauds, and that consequently the trustee was entitled to the money. For the wife it was urged that a parol agreement followed by part performance is binding, and that here there was performance of everything the husband had to do, which was to leave the money alone. The case of *Simmons* v. *Simmons* (3) was relied on by both sides. In that case the husband's bill was dismissed on the ground that he had not strictly entitled himself to any relief by the facts he had alleged and proved. But the Vice-Chancellor, while suggesting that a parol agreement followed by the parties voluntarily placing the property under the dominion of a trustee was a very different case from that of an agreement which had never been acted upon, gave no definite opinion on the law of the case. With much respect I subscribe to the opinion of the then Master of the Rolls, who in *Cooper* v. *Wormald* (4) said that, if a lady and gentleman transfer property before the marriage to trustees upon the trusts agreed upon by them by parol merely, and the trustee accepts the money accordingly, whether there be or be not any subsequent declaration of trust in writing, that transaction is good against all the world, and no

(1) 12 Ch. D. 256.

(2) 21 Ch. D. 657.

(3) 6 Hare, 352.

(4) 7 Beav. 266, 270.

creditor can set it aside. In my judgment to hold that under the law as it existed in 1879, a mere parol agreement not followed by any transfer of the property to trustees before the marriage could, whatever might be done after the marriage, constitute a good ante-nuptial settlement, would be to repeal in effect the Statute of Frauds so far as it relates to promises in consideration of marriage.

It has, however, been suggested that the wife is entitled to a settlement of this property, or at all events of some portion of it; and in my judgment there is some ground for this contention. As, however, I have only heard one side on this question, and that but partially, the case must be restored to the paper, if the parties desire it, in order that this point may be argued. There will be a declaration that the trustee is entitled subject to the wife's equity to a settlement, if any.

Order accordingly.

H. L. F.

From this decision the wife appealed.

1885. Mar. 6. *Warmington, Q.C.*, and *Cyril Dodd*, for the appellant. Sect. 4 of the Statute of Frauds does not render a parol agreement made upon consideration of marriage void; it only prevents an action being brought upon it. It does not prevent a defendant from relying on such an agreement to justify his possession. Here the trustee is in the position of a plaintiff; the wife is a defendant in possession: *Maddison* v. *Alderson* (1); *Simmons* v. *Simmons* (2); *Crosby* v. *Wadsworth* (3); *Laythoarp* v. *Bryant* (4); *Leroux* v. *Brown.* (5)

At any rate the evidence shews that there was a gift of the money by the husband to the wife after the marriage, and he became a trustee of it as her separate property: *Ashworth* v. *Outram.* (6)

The husband has never reduced the money into possession; it has never been under his absolute control. The husband could not sue the wife in order to reduce it into possession, nor can his trustee: *Purdew* v. *Jackson* (1); *Sherrington* v. *Yates* (2); *Nicholson* v. *Drury Buildings Estate Company*. (3)

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(1) 8 App. Cas. 467, 475.

(2) 6 Hare, 352.

(3) 6 East, 602.

(4) 2 Bing. N. C. 735, 747.

(5) 12 C. B. 801, 824.

(6) 5 Ch. D. 923, 937.

Cooper Willis, Q.C., and *Warrington*, for the trustee. The Statute of Frauds applies. A defendant cannot set up an agreement upon which he could not himself have maintained an action: *Warden* v. *Jones*. (4) The wife must prove an agreement such as will satisfy the statute, or she must prove part performance of the parol agreement, and the acts which are relied on as part performance must be distinct, and referable only to the agreement alleged: *Mews* v. *Mews* (5); *Surcome* v. *Pinniger*. (6) There is nothing sufficiently distinct here.

Nor does the evidence prove a gift to the wife after the marriage. The mere allowing the money to remain in the bank in the wife's former name is not enough; the husband should have given notice to the bank that the money was his wife's.

If there was no reduction into possession by the husband, there could be no gift by him to the wife.

BRETT, M.R. I do not think that the doctrine of part performance can be relied on in the present case. And as to the question which has been argued on the Statute of Frauds, I desire not to express any definite opinion, but, by not expressing an opinion, I do not intend to be understood as adopting the judgment of Cave, J., on that point. With regard to reduction into possession I will say nothing. But it seems to me that there is one perfectly plain view of the case which enables us to decide it in favour of the appellant, and upon that view I decide it, viz., that after the marriage the husband gave this money to the wife for her separate use, that he made himself a trustee of it for her, and that therefore the trustee in his liquidation is not entitled to it. The only inference which I can draw from the facts is, that the husband allowed the money to remain in his wife's former name in the bank, and allowed her to go on drawing cheques for the interest and the principal as she required the money, in order to carry into effect the promise which he had made to her before the marriage. There was a gift of the money to her, and he became her trustee.

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(1) 1 Russ. 1.

(2) 12 M. & W. 855.

(3) 7 Ch. D. 48, 55.

(4) 2 De G. & J. 76.

(5) 15 Beav. 529.

(6) 3 D. M. & G. 571.

BAGGALLAY, L.J. I am of the same opinion. It is unnecessary to decide the question on the Statute of Frauds, for, in my view of the facts, there was a gift of the money by the husband to the wife.

LINDLEY, L.J. I am of the same opinion. Looking at the facts, it is impossible to escape from the conclusion that the husband gave the money to the wife. With regard to the Statute of Frauds, I am not prepared to say that I admit the view of Cave, J., to be right, though I am not prepared to say that it is wrong. But I think that the decision in *Warden* v. *Jones* (1) is not inconsistent with *Laythoarp* v. *Bryant* (2), or *Britain* v. *Rossiter*. (3)

Solicitor for wife: *H. A. Maude, for W. Elmsley, Leeds.*

Solicitors for trustee: *Pitman & Sons, for Malcolm & Hainsworth, Leeds.*

W. L. C.

1884
Dec. 18.

[IN THE COURT OF APPEAL.]

THE SOCIÉTÉ GÉNÉRALE DE PARIS AND ANOTHER *v.* THE TRAMWAYS UNION COMPANY, LIMITED, AND OTHERS.

Company—Shares—Transfer—Transfer of Shares by Deed—Transfer in Blank—Delivery of Transfer by Transferor as his Deed—Equitable Mortgage of Shares—Notice—Priority—Maxim, "Qui prior est tempore, potior est jure"—Companies Act, 1862 (25 & 26 *Vict.* c. 89), s. 30—*Mode of giving Notice to Company—Notice to Secretary as an Individual.*

Where the shares of a company registered under the Companies Act, 1862, are pursuant to the articles of association thereof to be transferred by deed, a transfer at the time when the transferor parts with the possession and control thereof, must contain the name of the transferee and must identify the shares; and a transfer in blank, that is, a transfer, which at the time above mentioned neither contains the name of the transferee nor identifies the shares, is void, even although the name of the transferee and the number and the numbers of the shares afterwards, but not in the presence nor by the direction of the transferor, are filled in, and he then adopts and acknowledges the transfer; for the mere adoption and acknowledgment by the transferor of the transfer after it has been filled in, it not being either in his possession or under his control at the time of the adoption and acknowledgment, do not amount to a delivery of the transfer by him as his deed.

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(1) 2 De G. & J. 76.

(2) 2 Bing. N. C. 735.

(3) 11 Q. B. D. 123.

Hudson v. *Revett* (5 Bing. 368) distinguished.

The principle established in *Dearle* v. *Hall* (3 Russ. 1), as to the effect of notice in determining the priorities of equitable rights, does not extend to the shares of companies registered under the Companies Act, 1862, or to companies governed by regulations having a provision similar to s. 30 of that Act.

The Companies Act, 1862, s. 30, forbids the entry of any trust on the register of companies, and where the shares of a company either registered under that statute, or containing a regulation to the like effect with s. 30 thereof, are equitably assigned or mortgaged more than once, the priority of the assignees or mortgagees will be determined by the priority of the assignments or mortgages, and not by the priority of the notices thereof given to the company :—

So *held* by Brett, M.R., on the ground that a notice of an equitable assignment or mortgage, in order to be effectual, must turn the person to whom it is addressed into a trustee, and the Companies Act, 1862, s. 30, and any regulation of a company of a like nature, not only forbid the entry of any trust on the register, but also exempt the company from any liability for acting in contravention of a notice of the equitable assignment or mortgage:

By Cotton, L.J., on the ground that although the directors may be personally liable for permitting a transfer to be registered in contravention of equitable rights of which they have actual notice, nevertheless the company itself is not bound to recognise trusts, and cannot be made liable for accepting a transfer by any notice not to allow it:

By Lindley, L.J., on the ground that although the directors may be personally liable if they allow a transfer to be registered which they know to be fraudulent, nevertheless the only right of an equitable assignee or mortgagee against the company is to apply to the High Court under 5 Vict. c. 5, s. 4, and Rules of the Supreme Court, 1883, Order XLVI., for an order restraining the company from allowing a transfer to be made in contravention of his rights, and the company itself is not bound to take notice of equitable interests in shares not followed up in a reasonable time by proceedings to restrain a transfer.

Semble, by Brett, M.R., that the directors and secretary of the company will not be personally liable for disregarding a notice of a trust as to shares and for allowing them to be transferred in contravention thereof.

Martin v. *Sedgwick* (9 Beav. 333) dissented from.

Ex parte Littledale, In re Pearse (6 De G. M. & G. 714); *Ex parte Stewart, In re Shelley* (4 De G. J. & S. 543); *Ex parte Boulton, In re Sketchley* (1 De G. & J. 163); *Ex parte Union Bank of Manchester, In re Jackson* (Law Rep. 12 Eq. 354); and *Ex parte Agra Bank, In re Worcester* (Law Rep. 3 Ch. 555) discussed.

In order that a notice to a company may be effectual, either it must be given to the company itself through its proper officers, or it must be received by the company in the course of the transaction of its business: casual knowledge, acquired by the secretary as an individual and not whilst he is engaged in transacting the business of the company, cannot be deemed notice to the company.

In March, 1881, M. deposited with S. the certificates and a blank transfer of

100 shares in a company as security for money advanced. In February, 1882, S. died, and the secretary of the company, who was a relative of S., attended his funeral, and during a discussion of the deceased's affairs became acquainted with the existence of the charge on the shares. In December, 1882, M. was heavily in debt to the plaintiffs, and as they pressed him for payment, he fraudulently delivered to them another blank transfer of the same shares. Some days afterwards, the transfer to the plaintiffs was in the absence of M. filled up with the name of the plaintiff C. as transferee and with the numbers of the shares. The company refused to register the transfer to the plaintiffs on the ground that the certificates were not produced, and thereupon M. offered to indemnify the company against any other claim, but shortly after the executors of S. gave notice to the company of the existence of the charge in favour of their testator. The company was registered under the Companies Act, 1862, and one of the articles of association provided that the shares should be transferred by deed, and another provided that the company should not be bound by or recognise any equitable interest. In an action by the plaintiffs against the executors of S. to obtain a declaration of their title to the 100 shares:—

Held, first, that the knowledge acquired by the secretary of the company at the funeral of S. of the existence of the charge in his favour could not be deemed notice of its existence to the company itself:—

Held, secondly, that the offer of M. to indemnify the company could not be deemed to be a delivery of the transfer as his deed, after it had been filled in with the name of C. as transferee and with the numbers of the 100 shares, and that the shares had not been legally transferred to the plaintiffs who had only an equitable mortgage:—

Held, thirdly, that the notice by the plaintiffs to the company of the charge existing in their favour was notice of a trust, and therefore was invalid, and that the charge in favour of S. being prior in point of time, his executors had the better title in equity to the shares.

Action to establish the title of the plaintiffs to 100 shares in the Tramways Union Company.

The action was commenced in the Chancery Division, the writ of summons being issued on the 6th of January, 1883. The plaintiffs were the Société Générale de Paris and G. Colladon, their manager, and the original defendants were the Tramways Union Company, Limited, James Montgomery Walker, Janet Walker, William Stuart Walker, and Frederick Ramsay Walker. By an order made on the 18th of January by Pearson, J., all further proceedings in the action against the Tramways Union Company, Limited, were stayed. The statement of claim alleged that 100 shares had been transferred to the plaintiffs by deed duly executed by the defendant, James Montgomery Walker, and that the transfer was immediately after the delivery thereof also duly executed by the plaintiff, Colladon. Afterwards the action was transferred to the Queen's Bench Division, and came on for trial before Lopes, J., on the 18th and 22nd days of January, 1884, when the following facts were proved:—

The Tramways Union Company, Limited, was incorporated under the Companies Act, 1862. By the twenty-second of the articles of association it was provided that "the company shall not be bound by or recognise any equitable, contingent, future, or partial interest, in any share, or any other right in respect of a share except an absolute right thereto in the person from time to time registered as the holder thereof, and, except also as regards any parent, guardian, committee, husband, executor, or administrator, or trustee in bankruptcy, his right under these presents to become a member in respect of, or to transfer a share." By the twenty-sixth of the articles of association it was provided that "subject to the exercise by the company of the powers conferred by the 'Companies Act, 1867,' of issuing share warrants to bearer, and to any regulations of the company in that behalf, shares shall be transferable only by deed executed by the transferor and transferee, and duly entered in the register of transfers." John Edward Walker was the secretary of the Tramways Union Company and the chief clerk was named Mitchell. The Defendant James Montgomery Walker had been a director of the company. James Scott Walker, James Montgomery Walker, and Logan Russell had been in partnership as stock-brokers under the name of Walker, Russell & Co. for some years before 1879. In that year it was discovered that James Montgomery Walker had incurred considerable losses (which were ultimately ascertained to amount to upwards of 11,611*l.*), by speculations unauthorized by the firm, and on making this discovery the other partners required him, as some security to them against such losses, to deliver to them the certificates of 100 fully paid-up shares in the Tramways Union Company, together with a blank transfer executed by him. This was done in the month of September, 1879. Afterwards James Scott Walker agreed to become answerable to the firm for the losses, and thereupon the said certificates and transfer were handed over to him. These 100 shares were the qualification of James Montgomery Walker as a director of the Tramways Union Company. It was afterwards agreed that James Scott Walker should retire from the firm as from the 31st of December, 1880. On the 9th of March, 1881, James Montgomery Walker owed James Scott Walker 12,050*l.* 19*s.* 11*d.*, and by an agreement of that date and made between James Montgomery Walker of the first part, Logan Russell of the second part, and James Scott Walker of the third part, it was, amongst other things, agreed that James Scott Walker should lend to James Montgomery Walker alone the sum of 5000*l.* to be used as capital for working the business of the remaining members of the firm, that James Montgomery Walker should receive 300*l.* half yearly for his personal use, but that the remainder of the profits, to which he should be entitled, should be paid over to James Scott Walker, upon trust, first, to pay certain premiums and interest; secondly, to pay interest at 5*l.* per cent. per annum on a debt of 2200*l.* due to John Morris, and on the debts of 12,050*l.* 19*s.* 11*d.*, and of 5000*l.* severally due to James Scott Walker; and thirdly, to discharge these three debts. The fifth clause of the agreement was as follows: "Should the said James Montgomery Walker at any time overdraw from the moneys of the business the said half-yearly sum so agreed to be paid at his disposal for personal expenses as aforesaid, then the said James Scott Walker shall be entitled at once to withdraw such sum of 5000*l.*, and to call in and compel payment of the same by the said James Montgomery Walker." The seventh clause of the agreement was as follows: "That in the event of such overdrawing as aforesaid the sum of 500*l.* Tramways Union Stock, the present qualification of the said James Montgomery Walker for directorship in such company and now held by the said James Scott Walker with a blank transfer, shall be considered at the disposal of the said James Scott Walker, and he shall be at liberty to register such stock in any other name or sell the same for his own benefit and as against the said debt of 5000*l.*, and any other stocks or shares then in the hands of the said James Scott Walker as trustee under this agreement shall be transferred, sold, or otherwise dealt with by him for the purposes of the trust, and the proceeds applied in discharge of the said liabilities as if the same were moneys received in cash."

Logan Russell died in the year 1881, and James Scott Walker died on the 18th of February, 1882, having appointed by his will the defendants, Janet Walker, William Stuart Walker, and Frederick Ramsay Walker, his executors. On the day of the funeral of James Scott Walker a meeting of his relatives took place at his house, and his will was read by the solicitor of the executors together with the agreement of the 9th of March, 1881. John Edward Walker, the secretary of the Tramways Union Company, was a relative of the deceased, and was present both at the funeral and at the meeting of the relatives: he heard the agreement of the 9th of March, 1881, read, and his attention was drawn to the seventh clause as to the Tramways Union shares. The executors of James Scott Walker proved his will, but they took no step to get themselves registered as holders of the shares, as they did not wish that James Montgomery Walker should be removed from the directorship. He never paid off either to the testator or to the executors the two debts of 12,050*l.* 19*s.* 11*d.* and 5000*l.* James Montgomery Walker resigned his directorship in the summer of 1882.

In December, 1882, James Montgomery Walker owed the plaintiffs, the Société Générale de Paris, upwards of 7000*l.*, and as they were pressing him for payment, he sent to them, by way of security, a transfer of shares in the Tramways Union Company. At the time when the transfer was received by the plaintiff company, it was in blank, that is, it was simply signed by the transferor, and did not contain the name of any transferee, or the number, or the numbers of the shares. The certificates were not forwarded, they being in the possession of the executors of James Scott Walker. The plaintiff, Colladon, having objected on behalf of the plaintiff company that the certificates had not been sent, was informed by James Montgomery Walker that the certificates had been lost or mislaid, but that if application were made to the Tramways Union Company, it would be put in order. The secretary of the Tramways Union Company, John Edward Walker, was then absent, but the chief clerk of that company declined to certify the transfer. The transfer was, on behalf of the plaintiff company, filled up with the name of the plaintiff Colladon as transferee, and with the number and the numbers of the shares, and, having been stamped, was again taken to the office of the Tramways Union Company: but the chief clerk stated that he could not certify it without a letter of indemnity from James Montgomery Walker, and the latter accordingly, by a letter dated the 28th of December, 1882, undertook, if the transfer should be certified, to hold the company harmless and indemnified against any loss in the event of the missing certificates being forthcoming. On the indemnity being presented at the office of the Tramways Union Company, the chief clerk stated that a bankers' guarantee would be required. The plaintiffs carried on the business of bankers, and thereupon on the 30th of December, a similar guarantee, signed by James Montgomery Walker and also by the plaintiff Colladon on behalf of the plaintiff company, was tendered at the office of the Tramways Union Company and was refused. And ultimately the Tramways Union Company refused altogether to certify the transfer. In the meanwhile the plaintiff company had sold the shares, but being unable to give a valid transfer they were obliged to cancel the sale at a loss of 30*l.* On the 4th of January, 1883, notice was given to the Tramways Union Company by the solicitors of the defendants, the executors of James Scott Walker, that the certificates of the one hundred shares originally belonging to James Montgomery Walker had been deposited by him with the testator, and that they were then in the solicitors' possession on behalf of the executors, and the company were warned not to allow any dealings with the shares by James Montgomery Walker. No evidence was given to shew that James Montgomery Walker ever saw the transfer to the plaintiff company, or had it in his custody or under his control, after it had been filled up with the name of Colladon as the transferee, and with the number and the numbers of the shares. He became a bankrupt and absconded.

Lopes, J., having reserved his judgment, on the 9th of April, 1884, declared that the plaintiffs were entitled to the one hundred shares, and ordered the defendants, the executors of James Scott Walker, to deliver to the plaintiffs, or as they should direct, the certificates of the shares and the transfers thereof in their possession, and gave judgment for the plaintiffs for 30*l.* damages with costs.

The defendants, the executors of James Scott Walker, appealed.

Nov. 22, 27, 28. *Rigby, Q.C.* (*B. B. Rogers*, with him), for the executors of James Scott Walker. The Tramways Union Company had notice of the charge upon the shares created in favour of James Scott Walker immediately after his death, which occurred on the 18th of February, 1882. Their secretary, John Edward Walker, was his relative and was present at his funeral; and the attention of the secretary was specially drawn to the agreement creating the charge. The secretary was the officer of the Tramways Union Company to whom notice ought to be given, and notice to him was notice to the company themselves; it was immaterial that he acquired the knowledge of the charge, not as secretary, but as an individual: *Gale* v. *Lewis* (1). The executors of James Scott Walker, therefore, are entitled to succeed on the ground of priority in giving notice of their charge.

Further, James Montgomery Walker was heavily indebted to the plaintiffs, who were taking from him any security which they could get: as they knew that he was in pecuniary difficulties, they ought to have suspected fraud when he failed to produce the certificates of the shares: they acted with negligence, when they accepted his statement that the certificates were mislaid or lost: *Spencer* v. *Clarke* (2). The object of issuing certificates is that they may be used as indicia of title, and the plaintiffs cannot be allowed to pass over the title of the executors who had the certificates in their possession. The plaintiffs had merely a title which the directors of the Tramways Union Company at their discretion might or might not recognise: at any rate, the latter "were not bound to permit a transfer without the production of the certificates": per Lord Cairns, L.C., in *Shropshire Union Railways and Canal Co.* v. *Reg.* (3); and the circumstance of the possession by the executors of the certificates may be sufficient to exclude every other kind of title. The plaintiffs' claim must fail by reason of their own negligence.

Moreover, if it is to be assumed that the notice of the charge in favour of James Scott Walker, given on the day of his funeral to the secretary of the Tramways Union Company, is invalid, the equitable title of the executors to the shares was prior in point of time, and cannot be displaced, except, perhaps, by a legal transfer thereof. Both the executors and the plaintiffs were merely equitable assignees, and the Tramways Union Company, by both the Companies Act, 1862, s. 30 (1), and by No. 22 of their articles of association, were not bound to recognise, and in fact were disabled from recognising, any trusts. The intention was that the company should not be mixed up with, or embarrassed by, any dealings as to the shares except when the legal ownership is transferred. *Martin* v. *Sedgwick* (2) is not in point; it appears to have been a case of mortgage of shares by way of assignment. It is true that in determining the right to shares in companies under the clauses as to reputed ownership in bankruptcy statutes, it has been held to be material to consider whether notice of a mortgage has been given before the bankruptcy of the registered owner: *Ex parte Littledale, In re Pearse* (3); *Ex parte Boulton, In re Sketchley* (4); and the same doctrine applied under the Bankruptcy Act, 1869, (32 & 33 Vict. c. 71), s. 15, sub-s. 5, notwithstanding the exception therein contained as to choses in action: *Ex parte Union Bank of Manchester, In re Jackson.* (5) That statute was in force when the transactions took place to which the present action relates. (6) But those cases were between mortgagees of shares and the assignees or trustees in bankruptcy; the mortgagee had of course a good title as against the mortgagor, and was the "true owner" within the clause as to reputed ownership; therefore if he, without giving any notice of his title, allowed the mortgagor to remain on the register as the apparent owner, the latter was enabled to obtain a false credit, and the policy of the bankruptcy law would have been defeated, unless it had been held that the assignees or trustees in bankruptcy were entitled to the shares which had been mortgaged. The cases as to the effect of the clauses as to reputed ownership do not apply to the present action, which depends upon the conflicting rights of two sets of mortgagees.

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(1) 9 Q. B. 730.

(2) 9 Ch. D. 137.

(3) Law Rep. 7 H. L. 496, at p. 509.

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(1) By the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 30, "no notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies under this Act and registered in England or Ireland."

(2) 9 Beav. 333.

(3) 6 De G. M. & G. 714.

(4) 1 De G. & J. 163.

(5) Law Rep. 12 Eq. 354.

(6) See now the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44 (iii.).

Finlay, Q.C., and *J. M. Solomon*, for the plaintiffs. It will be contended for the plaintiffs, first, that they have a better title in equity; secondly, that they are the legal transferees of the shares in question.

As to the first point, the counsel for the executors of James Scott Walker has relied upon the fact, that the charge in favour of the testator was created before the charge in favour of the plaintiffs; but priority in time is the last equity to be invoked; the maxim, "Qui prior est tempore, potior est jure," must not be applied in too wide a sense: per Kindersley, V.C., in *Rice* v. *Rice*. (1) The only point as to which the executors can be said to have a better equity than the plaintiffs, is the possession of the certificates; but the conduct of the executors has been such as to deprive them of any priority which otherwise they might have claimed. In *Mangles* v. *Dixon* (2) it was held by Lord Cottenham, L.C., that notwithstanding the rule that the assignee of a chose in action takes it subject to all equities subsisting against it in the hands of the assignor, the parties entitled to such equities may lose their right to enforce them against the assignee, by neglecting to give him timely notice of any fact to which they have been accessory, tending to mislead him as to the real interest of the assignor; and although the decree of Lord Cottenham, L.C., was reversed by the House of Lords (3), the doctrine above stated stands practically unimpeached. It applies to the present case; for the testator, and afterwards his executors, allowed James Montgomery Walker to remain the apparent owner of the shares, which had been rendered subject to a charge in their favour; and owing to their neglect the plaintiffs were induced to accept those very shares as a valid security for part of the debt due to them. If the question of notice is material, the plaintiffs are entitled to succeed; the transfer to them was filled up, and having been so filled up was taken to the office of the Tramways Union Company on the 28th of December, 1882; notice of the plaintiffs' charge was thus given to the officers of that company, who demanded an indemnity before registering the transfer. The notice of the charge in favour of the testator, James Scott

(1) 2 Drew. 73. (2) 1 Mac. & G. 437.
(3) 3 H. L. C. 702.

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Walker, was subsequent to the notice of the charge in favour of the plaintiffs; for the notice alleged to have been given to the Tramways Union Company through their secretary at the funeral of James Scott Walker, cannot be seriously insisted on. No doubt it was intended that the Tramways Union Company should not be bound by the mere knowledge of any trust, and that no notice should be entered on the register of the company; but there was nothing to prevent the plaintiffs, as equitable mortgagees, from perfecting their title by giving notice of their mortgage to the Tramways Union Company: *Ex parte Stewart, In re Shelley.* (1) That case was decided on the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47), s. 19, which was substantially the same as the Companies Act, 1862, s. 30; it shews that the object of those two enactments was merely that the register of a company should not be incumbered with the notice of any trust, and that they do not relieve a company from liability, if the company acts in defiance of a notice that a trust exists which affects some of its shares. Without notice the title of an equitable mortgagee is imperfect and void as against a subsequent incumbrancer: *Ex parte Boulton, In re Sketchley* (2); and therefore the claim of the executors must be postponed to that of the plaintiffs. Provided that notice is given to the company in the course of the transaction of its business, it does not matter by whom the notice is given: *Ex parte Agra Bank, In re Worcester.* (3) It is true that the three cases last cited related to the doctrine of reputed ownership, but in principle they are not to be distinguished from the present action: the argument of the counsel for the executors really is an attempt to shew that these three decisions were wrong. And it appears to follow from the reasoning of Lord Abinger, C.B., in *Cumming* v. *Prescott* (4), that if shares are equitably assigned or mortgaged more than once, the priority of the assignees or mortgagees will be determined, not by the priority of the assignments or mortgages, but by the priority of the notices thereof given to the company. The case last cited did not depend upon the doctrine of reputed ownership, it was a creditors' suit for administration. The real question is, who has the better title in equity to call for a legal transfer of the shares? and the plaintiffs have the better equity, inasmuch as the notice of their charge was prior in point of time. *Martin* v. *Sedgwick* (1) is perhaps overruled by the decision of the House of Lords in *Shropshire Union Railways and Canal Co.* v. *Reg.* (2); but the judgment of Lord Cairns, L.C., in the case last named (p. 509), shews that the executors of James Scott Walker cannot rely upon the mere possession of the certificates. It has been held that the equitable mortgagee of shares has a right to sue the company, notwithstanding a clause in the company's deed of settlement that they shall not be affected by any notice of a trust: *Binney* v. *Ince Hall Coal and Cannel Co.* (3) The plaintiffs were entitled to a judgment and to an order for the delivery of the certificates under Rules of the Supreme Court, 1883, Order XLVIII., as well as for damages; and the executors are liable in damages, because they were tort-feasors and incited the Tramways Union Company to refuse to recognise the plaintiffs' claim, and not to transfer the shares, which meanwhile became of less value owing to a fall in the price of the market: *Dugdale* v. *Lovering.* (4)

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(1) 4 De G. J. & S. 543.

(2) 1 De G. & J. 163.

(3) Law Rep. 3 Ch. 555.

(4) 2 Y. & C. Ex. 488, at p. 496.

As to the second point, the plaintiffs had a valid title at law to the shares, inasmuch as they were the legal transferees thereof. It was no doubt proved that the transfer to the Société Générale was drawn up in blank, and that the name of the plaintiff, Colladon, was filled in as that of the transferee at a subsequent time; and it is not denied for the plaintiffs that a transfer by deed of shares must, in order to be effectual, be complete at the time of delivery: *Hibblewhite* v. *M'Morine.* (5) It is true that a document which purports to be a deed, but in truth has been written and filled up after it has been signed and sealed, is invalid: Perkins's Profitable Book, ch. 2, tit. Deeds, s. 118; but it is plain from s. 154 of the same treatise that although there cannot be two effectual deliveries of the same deed, nevertheless if a first delivery is void a second will stand good. In the present case the transfer to the plaintiffs of the shares in blank was ineffectual to pass the legal ownership; but after it was filled up, it was acknowledged and adopted by the transferor James Montgomery Walker, who offered an indemnity to the Tramways Union Company if they would recognise the transfer. The transfer was then perfect, and was in truth then delivered by him as his deed. The present case is not to be distinguished in principle from *Hudson* v. *Revett* (1); and if the decision of Lord Mansfield in *Texira* v. *Evans* (2) was correct, the plaintiffs could fill up the transfer at any time. The alteration of a deed, in order to carry out the real intention of the parties, does not avoid it: *Hall* v. *Chandless.* (3)

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(1) 9 Beav. 333.

(2) Law Rep. 7 H. L. 496.

(3) 35 L. J. (Ch.) 363.

(4) Law Rep. 10 C. P. 196.

(5) 6 M. & W. 200.

[Brett, M.R. The decision in that case turned upon a different point.]

A recent case as to the effect of a transfer of shares in blank is *France* v. *Clark* (4); the decision in that case was not adverse to the plaintiffs; for it turned upon the rights of the assignee of an equitable mortgagee, and not upon those of the equitable mortgagee himself.

Rigby, Q.C., in reply. As to the second point urged on behalf of the plaintiffs, namely, that the shares were legally transferred to them, it is to be observed that there was no delivery of the transfer by the transferor after it had been executed by the plaintiff, Colladon; there was no evidence that the transferor saw the transfer after it had been executed by Colladon. Therefore on the 28th of December, when the transferor offered an indemnity to the Tramways Union Company, no document was in existence which could be deemed to be a deed. No doubt the original intention of the transferor and of Colladon was that the name of the ultimate purchaser should be filled in.

As to the first point urged on behalf of the plaintiffs, namely, that they have a better title in equity, it is to be observed that it is plain from the judgment of Lord Westbury, L.C., in *Ex parte Stewart, In re Shelley* (5), that the Tramways Union Company were not bound to recognise equitable assignments or mortgages, but might do so if the directors thought fit. If a trading company does not enjoy a privilege (created either by statute or by articles of association) to disregard all notices of equitable assignments, they will be seriously embarrassed in their business; for they will register the transfer of shares at their peril if they have notice of a charge upon them.

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(1) 5 Bing. 368.

(2) Cited by Wilson, J., in *Master* v. *Miller*, 1 Anstr. 225, at p. 228.

(3) 4 Bing. 123.

(4) 26 Ch. D. 257.

(5) 4 De G. J. & S. 543, at pp. 547 548.

Cur. adv. vult.

Dec. 18. The following judgments were delivered:—

Brett, M.R. My judgment in this case will be short: I am almost inclined not to deliver any judgment; still as I have formed an opinion upon the matter, I shall express it shortly, and my Brothers, who are more conversant with the subject-matter of this appeal, will give more elaborate judgments.

This action was commenced against the defendants, the Tramways Union Company, and other defendants, but now the proceedings against the Tramways Union Company are stayed. The dispute between the parties has arisen out of the conduct of a person named James Montgomery Walker, who seems to me to have acted fraudulently, and the question is who is to suffer by reason of his fraud. He had raised or borrowed money from a testator who is represented in this action by his executors, and James Montgomery Walker had mortgaged or charged certain shares. He had delivered to the testator the certificates of those shares, and he had given to him a blank transfer; but neither the testator nor the executors had completed this title to the shares by getting themselves entered upon the register of the company. It is obvious, therefore, that their title was merely equitable. James Montgomery Walker, after having mortgaged his shares to the testator, borrowed money from the plaintiffs, and afterwards fraudulently assumed to hypothecate or to pledge the same shares with them. He obviously led them to suppose that he had power to pledge with them these shares, but of course he could not produce to them the certificates of the shares because they had been already deposited with the testator, and instead of them he gave to the plaintiffs a blank transfer alleging that the certificates of the shares were lost. If nothing else had happened, I apprehend what he did would have simply amounted to an equitable mortgage of these shares to these plaintiffs, which, so far as I have stated, was not a legal title vested in them. But it was contended that there had been a legal assignment to the plaintiffs by reason of his having executed a deed of transfer, and it was said that having done that which was equivalent to a legal assignment, he gave them a legal title. I shall not go further into that transaction than to say, that I have come to a clear opinion that this case was not brought within the principle of *Hudson* v. *Revett* (1), and that what happened cannot be treated as a delivery of a deed by him, and therefore that the right of the plaintiffs, like the right of these defendants who are the executors, was equitable only.

Now I come to the question, what are the rights of the several parties, both titles being merely equitable? These shares are shares in a company which is within the provisions of the Act of 1862, and also this company had, in its articles, a clause which went as far as, and probably farther than, the enactments with regard to such a company in the Act of 1862. The question resolves itself into a question of notice. It was said that the executors had given notice to the company of their equitable right, and in support of that allegation circumstances were given in evidence with regard to the knowledge, which was brought home to the secretary of the Tramways Union Company at a funeral. Now I confess that my mind never could go with the supposition that that was to be considered as a notice to the company; it was a casual notice, brought home to the secretary not as secretary, but in quite another capacity, namely, as a relative or friend of the deceased person whose funeral he was attending, and nobody, except in the stress of argument at the bar, would argue that that could be a notice to the secretary of the company as secretary of the company, and a notice to the company. Therefore, the equitable rights of the defendants existed first in point of time, but without any notice of their existence being given to the company.

Now comes the question whether the plaintiffs, although their equity was brought into existence later than the defendants', can, within any equitable doctrine, get priority over the defendants? It was alleged that they could, because, as it was said, they had first given notice to the Tramways Union Company. It is true in point of fact, that they have given a notice to the secretary or chief clerk, which, if nothing existed to mar it, would, I think, have been notice to the company. But then I wish to consider what this equitable doctrine is, and what it involves. The equitable doctrine seems to me to involve this, that the plaintiffs cannot be said to have given a valid notice to the company, unless at the same time the notice is said to have involved certain consequences and liabilities upon the company, that is, to have turned them into trustees: unless the notice has had that effect, it seems to me that the equitable doctrine cannot be said to be fulfilled. This point raises a very material matter as to the position of companies, and raises this question, What is the effect upon that equitable doctrine of the 30th section in the Act of 1862, and of such a clause in the articles of association of a company, as that which is in the articles of association of the Tramways Union Company? The Act says that such a company need not take any notice of equitable trusts, it need not be bound by them; but if this notice to the company is allowed to put them into the position of trustees, it seems to me that they are put under a liability which the Act of Parliament says they are not to be subject to. If they are to be turned into trustees, of necessity they are bound to take notice of trusts. It was suggested at one time that the only meaning of that Act of Parliament was that the company need not take notice on the register of any trusts—need not enter the trusts upon the register—so that the register would be kept simple and clear. After considering the matter I cannot accept that argument. For the moment it struck me very much; but although it was said to have been the suggestion of Lord Westbury, L.C., in *Ex parte Stewart, In re Shelley* (1), yet I do not think his suggestion went that length, and I certainly do not think that that can be the meaning of the Act of Parliament. Legislation would be practically ineffective, if the meaning of the enactment is confined to that extent. Therefore, it seems to me that that Act of Parliament meant that the company need not take notice in any way of trusts. I think it contrary to sense to say that a notice can be given to a company which will involve them in responsibility, and at the same time to say that they

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(1) 5 Bing. 368.

(1) 4 De G. J. & S. 543, at pp. 547, 548.

need not, and are not bound to take any notice of trusts. The one suggestion contradicts the other. Therefore, it seems to me that a person in the position of the plaintiffs, having the equitable rights of the plaintiffs, cannot, so far as the company is concerned, give a notice to that company, which shall have the effect of giving him a priority over persons in the position of the defendants. It seems to me that that cannot be so.

There is another point of view of the matter, according to which, although the notice may not enable the plaintiffs against the company to get any rights, yet being given to the secretary or to the directors, it may put the secretary or the directors into a dangerous position, if they, or any of them, after such a notice, were to do anything to assist a transfer contrary to the equity of the plaintiffs, of which they personally had notice. Whether the personal notice to the secretary, or whether the personal notice to some or all of the directors would put any responsibility in equity upon them individually, it seems to me not necessary to decide in this case. Take the secretary, for instance; the suggestion would seem to me to put him into a difficulty into which, as at present advised, I have an inclination of opinion that no man ought to be put, namely, that if he is to incur responsibility by doing anything contrary to the notice given to him by persons in the position of the plaintiffs, he may very soon afterwards be directed and ordered by his own masters to do that which would be a breach of that responsibility; and I doubt very much, although it is not necessary to decide it, whether any personal obligation can be put upon the secretary by a notice of that kind, which is not intended to be a notice to him upon which he is to act as an individual, but which is only given to him in order that he may pass it on to the directors, or the company, of whom he is the servant. The same difficulty, to my mind, exists with regard to individual directors, whether they can be made personally responsible; because directors, although they are in a different position from the secretary, are after all mere servants of the company, and I have my doubts even about them. I only say this as to the individual responsibility of persons to whom notice is actually given, by way of guarding myself from being thought to decide that point now, or to decide it before it is absolutely necessary for the Court to come to a conclusion upon the matter. Therefore, I myself, for the reasons which I have shortly given, am of opinion that the plaintiffs in this case have no equity superior to that of the defendants, and therefore that the defendants' prior equity ought to prevail.

With regard to the authorities which have been cited as to the order and disposition clauses of the Bankruptcy Acts, my own opinion is that they do not touch this case. I think that in the great majority of cases with regard to whether shares are within the order and disposition of the bankrupt, two parts of a proposition are to be considered; they must be in the order and disposition of the bankrupt and with the consent of the true owner. My own opinion is that in all the cases but one, in which shares have been treated of, the question arose whether they were in the order and disposition of the bankrupt with the consent of the true owner, and whether the notice having been or not having been given by the equitable owner, shewed that they were or were not in the order and disposition of the bankrupt with his consent. With regard to *Ex parte Agra Bank* (1) my own view of it is this, that the Court assumed without fully considering the point which is now before us, that by reason of notice the shares were not in the order and disposition of the bankrupt, and therefore that case does not in any way decide the present point. Whether the Court may have overlooked the considerations which have been called to our attention in this case or not, is not material to consider when that case is treated, not upon appeal from it, but merely as an authority for a legal proposition.

COTTON, L.J. This action is brought with reference to 100 shares in the Tramways Union Company. That company were originally made parties to the action, but have been dismissed, and the only parties now before us are the Société Générale de Paris and their manager, Colladon, who are the plaintiffs, and the executors of James Scott Walker, who are the defendants. Another defendant, James Montgomery Walker, does not appear before us. With that statement of the parties I will read the judgment which I have prepared.

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(1) Law Rep. 3 Ch. 555.

Cotton, L.J.

The plaintiffs in this case seek to establish as against the defendants, the executors of James Scott Walker, a claim to 100 shares in the Tramways Union Company, now standing in the name of James Montgomery Walker. The title of the executors is admittedly equitable only, and the first question is, What is the plaintiffs' title? Is it, as alleged by the statement of claim, legal, or is it equitable only? The articles of the Tramways Union Company require that transfers of shares in the company must be by deed. It appears that at the time when James Montgomery Walker signed and sealed the instrument on which the plaintiffs rely, neither the number or numbers of the shares, nor the name of the intended transferee was inserted, but that the name of the plaintiff Colladon, and the number and numbers of the shares were afterwards filled in, but not by, or by the direction, or in the presence of the defendant, James Montgomery Walker. He, after the blanks were thus filled in, sent to the Tramways Union Company a letter to indemnify them if they would recognise the transfer of the shares without production of the certificate, which, in fact, was then in the possession of the representatives of James Scott Walker. But it does not appear that James Montgomery Walker knew whose name had been inserted as transferee, and in my opinion there is no such evidence as would justify us in finding that there was a delivery by James Montgomery Walker of the transfer as his deed after the blanks had been filled in. Under these circumstances I am of opinion that no deed of transfer of the shares in favour of the plaintiff Colladon was executed by James Montgomery Walker, so as to enable the plaintiffs to require the company to register Colladon as holder of the shares, and that the action must be considered as one by the plaintiffs to compel James Montgomery Walker specifically to perform his contract with them by transfer of the shares, notwithstanding the claims of the defendants, the executors of James Scott Walker. These claims are founded on a contract earlier in date than that under which the plaintiffs claim, and the question is, how can the plaintiffs establish that the Court is required to disregard the priority which the dates give to the executors, unless there is sufficient to give the plaintiffs an equity against the executors, so as to prevent them from insisting as against the plaintiffs on their prior title to the shares.

The principal point urged on behalf of the plaintiffs was this, that notice of their claim to the shares was given to the company before the board had any knowledge or notice of the claim of the executors, and that on the principle laid down in *Dearle* v. *Hall* (1) this gave priority to the plaintiffs.

I will first dispose of the contention urged on behalf of the defendants, that in fact notice was given of their claim before any was given of the plaintiffs' charge. What the executors relied on as notice was this: the secretary of the company whose duty it was to keep, under the control of the board, the register of transfers, was a relation of James Scott Walker, and he was present when on the day of the funeral the solicitor of the deceased read, amongst other documents relating to the deceased's estate, the agreement under which the executors claim. Where notice to the board is necessary, it is not essential that notice should be given formally, but notice to be effectual must be information given or coming to them as directors, or in a matter relating to the interests of their company. But here the information given to the secretary was given to him, not as secretary to the company, but as a relation of the deceased, and not with reference to the affairs or business of the company, but as explanatory of the state of the affairs of the deceased. I am of opinion that the defendants, the executors, have not shewn that the board or the company had notice of their claim before they received notice of that of the plaintiffs.

We must, therefore, consider the question, which is one of great importance, whether the priority of notice given by the plaintiffs is sufficient to displace the prior claim of the executors. The company was one formed under the Companies Act, 1862, and the 22nd section of that Act is as follows: "The shares or other interest of any member in a company under this Act shall be personal estate, capable of being transferred in manner provided by the regulations of the company:" that is as far as I need read it. Then the 30th section is this, "No notice of any trust, expressed, implied, or constructive, shall be entered on the register or be receivable by the registrar in the case of companies under this Act and registered in England or Ireland." These two sections have this effect, that in these companies shares can be transferred, so as to give a right as against the company, by the form required by the articles or deed of settlement, and then s. 30 does in terms provide that no notice of any trust is to be entered on the register. That, therefore, excludes any notion of a trust being binding as against the company, when the Act has pointed out in what way a transfer may be effectually made so as to compel the company to receive the transferee as a shareholder. Then, besides this, the 22nd article of association goes perhaps even a little further: "The company shall not be bound by or recognise any equitable, contingent, future, or partial interest in any share, or any other right in respect of a share, except an absolute right thereto in the person from time to time registered as the holder thereof." Now, of course, that is subject to this qualification, that if there is a transfer executed so as to be effectual under the Act, and in accordance with the regulations of the company, the transferee has a right as against the company (which as long as he has not any transfer he has not) to be recognised as a legal shareholder and to be entered upon the register. The defendants say that, having regard to the Act and articles, any notice to the board would be inoperative and of no effect, that the Act and articles justify and require the board to disregard any notice given of any contract affecting shares other than an effectual deed of transfer. This contention, I think, goes too far. The clause in the Act, and that in the articles, prevent anyone from asserting as between himself and the company, that he is entitled to the position or any of the benefits of the position of a shareholder, unless he is an allottee of shares, or a transferee under an instrument, such as is required by the constitution of the company. But neither the Act of Parliament, nor the articles, in any way lay down that the directors can neglect a notice informing them of circumstances, which render it wrong for them to accept or recognise a transfer by the registered shareholder, so as to defeat or prejudice rights of which they have been informed by the notice. This is, I think, in accordance with the view expressed by Lord Westbury in *Re Stewart*. (1) What he says is this—he

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(1) 3 Russ. 1.

(1) 4 De G. J. & S. 543, at p. 548.

is referring to an enactment like that which I have read—"The object, therefore, of the legislature was, that all persons appearing on the register should have a clear title not incumbered by the embarrassment which must arise if the legal title were permitted to be affected by notice; or, in other words, that the company itself should not be bound by any trust, and that no notice should have any effect as against the company." In my opinion, where the board have actual knowledge of circumstances which shew a claim, though an equitable one, to shares, it would be their duty to refuse to register a transfer by the shareholder, apparently in violation of the rights of which they have knowledge, until they have investigated the conflicting claims, or have given notice to the person whose claims are apparently inconsistent with the proposed transfer. The company are not bound to recognise trusts, and, in my opinion, cannot be made liable for accepting a transfer by any notice not to allow a transfer, or by any knowledge of the board of facts inconsistent in equity with his right to transfer. But here, as in most companies, it is part of the duty of the board to control the entries on the register. I do not say that the directors would in all cases be liable, if they registered a transfer inconsistent with an equitable claim of which they have received notice, or that they are bound to keep a register or record of such notices; but where they are asked to register a transfer which from circumstances in fact known to them at the time would be in violation of the rights of others, in my opinion they cannot, either safely to themselves or without disregard of their duty, register the transfer, at least without allowing time for inquiry and for the assertion of the equitable rights, if any, inconsistent with the claim to register the transfer. Of course as against a legal transferee any one having an equitable title would have no right to be registered, unless the person having the legal transfer had notice of the equity at the time he took that which gave him what is equivalent to a legal right, a right to go directly against the company to be registered. The cases on the question whether shares are in the order and disposition of a bankrupt, which I shall hereafter examine, are inconsistent with the contention that notice to the board can be treated as a nullity, or as, under all circumstances, of no effect. But the question nevertheless remains, whether the principle as to priority established in *Dearle* v. *Hall* (1) is applicable to equitable assignments of shares in companies where, until an effectual instrument of assignment is executed, there can be no claim against the company, however complete in equity the contract of assignment may be as between the shareholder and his transferee. Where there is an assignment, available only in equity, of an interest in personalty vested in a trustee, or of a debt due to the assignor, there notice is necessary, for until notice is given, the trustee can pay to his original cestui que trust, and the debtor may pay to his creditor. But after notice the trustee holds the fund in trust for the assignee, and the debtor cannot obtain a good discharge without the concurrence of the transferee. In equity, without any further act done by the assignor there is, as against the trustee or debtor, a change of the person entitled to be considered the cestui que trust or creditor, and disregard of the assignment will, in equity, make the trustee or debtor liable. In a case like the present the company do not recognise, and are in no way bound to recognise trusts, and there is no claim against the company, unless and until a transfer of the shares is executed. But the cases as to order and disposition are strongly relied upon by the plaintiffs and must be considered. These decisions establish that in cases where shares in companies would otherwise be in the order and disposition of a bankrupt, the knowledge of the board previously to the bankruptcy of an existing equitable claim, will prevent the shares from being within the order and disposition clause. Some of these decisions may be explained by the suggestion which has been made, that where the notice has been given by the person entitled to the equitable charge or interest, this, even though the notice were ineffectual, would establish that the shares were not left in the order and disposition of the bankrupt with the consent of the true owner. But this explanation cannot apply to the decision in the case of the *Agra Bank* (2), where no notice was given by the equitable incumbrancer, but the directors had knowledge of the transaction. These cases, therefore, establish that notice to or knowledge of the board is effectual to prevent a subsequent transfer by the shareholder, that is, take them out of his disposition. But in none of these cases was there any question as to the effect of notice on the priority of equitable incumbrancers, and in all cases the equitable incumbrance was of necessity prior in date to the title of the assignee. Moreover, in these cases where in the absence of notice the title of the assignee in bankruptcy prevailed, nothing further remained to be done by the shareholder, inasmuch as where shares are in the order and disposition of a bankrupt, the Act gives the assignee in bankruptcy a right thereto. These cases, therefore, are quite satisfied by giving to a notice to the board of an equitable incumbrance on shares the effect of requiring the board not to register a subsequent transfer without inquiry whether it is in violation of rights created by the transferor. As already pointed out, there is an essential difference between the nature of shares, and of an equitable assignment thereof, and that of choses in action properly so called, and assignments thereof, and in my opinion we ought not to apply the rule, established as regards the latter, to a subject-matter of so different a nature, or to lay down that a prior equitable interest in shares is to be postponed to one later in date, merely because the person entitled to the latter has first given notice of his claim, unless we are compelled by decisions so to hold.

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(1) 3 Russ. 1.

(2) Law Rep. 3 Ch. 555.

There is, I think, one decision only, which can be quoted by the plaintiffs as in their favour, *Martin* v. *Sedgwick*. (1) In that case, as reported, Lord Langdale held that the interest of a cestui que trust of shares must be postponed to the claim of a person holding a security apparently effectual only in equity, created by the trustee of the shares, of which he had given notice to the company, on the ground that the cestui qui trust had given no notice to the company. If this was in fact the decision, this Court is not bound by it, and, I think, should decline to follow it, and indeed it must be considered as having been overruled by *Pinkett* v. *Wright* (2), afterwards affirmed in the House of Lords. (3) But in the case of *Ex parte Boulton* (4), Turner, L.J., expressed himself in terms which strongly support the plaintiffs' contention. Any opinion expressed by Turner, L.J., is entitled to the greatest weight; but the opinion which he expressed was not necessary for the decision of the case before him, which was one under the order and disposition clauses of the Bankruptcy Act; and no decision except that of *Martin* v. *Sedgwick* (1) could be quoted by the plaintiffs in support of the view thus expressed by Turner, L.J. In my opinion we ought not to be induced by respect for what he said, to apply the rule established in *Dearle* v. *Hall* (2) to dealings with property, to which in principle that rule is in our opinion not applicable. In my opinion notice of an equitable claim to shares given to directors under circumstances like those of the present case, gives no right as against the company, and operates only as a notice to them not to allow a transfer without giving the person of whose claim they have notice a reasonable time to enforce his claim, and that it is effectual only for a reasonable period, that is, for the time during which it must be presumed that the facts remain present to the minds of the directors, and that they ought to consider the claim as a continuing one, but that it in no way affects the priority inter se of those who have claims to the shares available only in equity.

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(1) 9 Beav. 333.

(2) 2 Hare, 120.

(3) 12 Cl. & F. 764.

(4) 1 De G. & J. 178.

That is the most important point in the present case; but there was another point urged on behalf of the plaintiffs which must not be disregarded. It was this, they said that here the executors had intentionally abstained from giving any notice to the company of their claim, or seeking to get a transfer of the shares. That was so, but it was not done in order that James Montgomery Walker might be enabled to deal with the shares; that would have made it a very different case, that would have been an act of fraud on the part of the executors, intentionally enabling him to commit a fraud, and if they had done so of course they must have suffered for it. But it was this, they did not wish to make the fact of the charge known to his fellow directors; and if it had appeared that the plaintiffs had advanced their money in consequence of no notice having been given, it would have been a matter which would have required very serious consideration, but in fact, as far as I can see on the evidence here, the plaintiffs substantially did nothing to their prejudice in reliance on the fact that there was no notice of any claim against these shares.

(1) 9 Beav. 333.

(2) 3 Russ. 1.

James Montgomery Walker was very largely indebted to them, and when he was very largely indebted to them they took an agreement from him to transfer these shares. No doubt that would make it an agreement for valuable consideration, but they did not advance money on the faith of those shares being the unfettered property of James Montgomery Walker. In my opinion they cannot therefore on that ground, if the executors of James Scott Walker are otherwise entitled to priority, contend that they have the equity against the executors which will enable them to set aside the prior equitable title of the executors.

Lindley, L.J. The first matter for consideration is the title of the plaintiffs and of the defendants. The defendants' title is equitable only; they hold a blank transfer and the share certificates, but the legal title clearly is not in them. The plaintiffs' title is also equitable only. They held a transfer in blank, and then filled it up, but notwithstanding the reference to it by the transferor in his letters of indemnity the transfer in its complete state was never seen by him, nor is there any evidence to shew that he knew how it was filled up or the state in which it was, when it is contended that he ought to be treated as having re-delivered it. Had there been such evidence, I should have been prepared to infer a delivery after the transfer had been duly filled up on the authority of the case of *Hudson* v. *Revett.* (1) But as the evidence stands, I think such an inference ought not to be drawn, and Lopes, J., who tried the case and heard the evidence, arrived at the same conclusion.

The plaintiffs therefore must be treated as having only an agreement to transfer, and not as the legal transferees of the shares by virtue of a deed duly executed by the transferor. The titles of both parties being equitable, the next point to determine is their priorities.

The defendants contended that they were entitled to priority, first, because their security was first in point of time and they gave notice of it to the company before the plaintiffs gave the company notice of their security; and secondly because even if the defendants did not first give notice of their security, still it was first in point of date, and they have done nothing which entitles the plaintiffs to say that they have acquired a better right than the defendants to the legal ownership of the shares.

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(1) 5 Bing. 368.

The plaintiffs, on the other hand, contend that they are entitled to priority over the defendants, first, because the plaintiffs first gave notice of their security to the Tramways Union Company; and, secondly, because even if this is not sufficient, still, by reason of the conduct of J. S. Walker and the defendants, the plaintiffs have acquired a better right than they to the legal ownership of the shares.

It will be convenient first to consider the question, whether the Tramways Company had notice of the defendants' security before the plaintiffs gave notice of their security. The notice alleged to have been given to the company of the defendants' security was given as follows: Mr. J. E. Walker, who was secretary of the Tramways Union Company, was present at the funeral of Mr. J. S. Walker. On that occasion the agreement creating his security was read, and Mr. J. E. Walker said in his evidence that he recollected the clause in the agreement relating to the shares, because it interested him as secretary to the company; but he also stated that he did not consider the notice at the funeral an official notice. Under these circumstances Lopes, J., held that what took place at the funeral was not notice to the company of the defendants' security, and I entirely concur in his decision on this point. The secretary was in no way representing the company at the funeral; no notice was given to him as the agent of the company, nor did he acquire any knowledge of the defendants' security whilst transacting the company's business, or in any way for or on behalf of the company. It appears to me, therefore, impossible to treat the company as having acquired through him notice of the defendants' security before the plaintiffs gave notice of theirs.

I proceed now to consider whether the plaintiffs obtained priority over the defendants by first giving notice to the company of their security and requiring the company to register them. Lopes, J., decided this point in favour of the plaintiffs. The point thus raised is one of very great importance, and it is surprising to find how little authority there is upon it. It becomes necessary, therefore, to examine it carefully upon principle. In the first place it is necessary to bear in mind that we have to deal with a company registered under the Companies Act, 1862, and not with a company which is a mere partnership with transferable shares not governed by any statute. Shares in companies governed by the Companies Act, 1862, are declared by s. 22 to be personal estate capable of being transferred in manner provided by the regulations of the company. The interest of a shareholder is a legal, not an equitable interest, and this legal interest is capable of legal transfer. The form of transfer, for example, whether it is to be by deed or not, depends on the regulations of the company. In this particular company a deed was necessary. When a shareholder, entitled to transfer his shares, has duly executed a proper transfer to an unobjectionable transferee who has duly accepted a transfer, the transferee has a legal right to the shares transferred, and he can compel the company by legal, as distinguished from equitable, proceedings to recognise his title, and can compel the company by legal proceedings, taken in his own name, to register him as a shareholder. In this respect shares are different from debts, and by reason of this difference it has been held, and I think properly, that shares in companies governed by the Companies Act, 1862, are not choses in action within the meaning of the reputed ownership clause, s. 15, of the Bankruptcy Act, 1869: *Ex parte Union Bank of Manchester.* (1) Shares in companies are no doubt often spoken of as choses in action; but that expression, which was originally confined to debts, has unfortunately been gradually extended to all incorporeal personal property,—for example, Government annuities, copyrights, and patents. But if shares in companies registered under the Companies Act, 1862, are spoken of as choses in action, care must be taken not to overlook the fact that their transferee has a legal, and not merely an equitable, right to become a shareholder. If a shareholder in a company governed by the Companies Act, 1862, does not transfer his shares, but agrees to transfer them or to hold them upon trust for another, either absolutely or by way of security, there can be no doubt as to the validity of the agreement, nor as to the effect of it as between the parties to it. As between them the agree-

(1) Law Rep. 12 Eq. 354.

ment or trust can be enforced; but as regards the company the shareholder on the register remains shareholder still. He is the person to exercise the rights of a shareholder,—for example, to vote as such, to receive dividends as such, and to transfer the shares. On the other hand, he, and he alone, is liable for calls and to be put on the list of contributories if the company is wound up. The person having the beneficial interest in the shares has, as against the company, no right to them; he has as against the company no right to have them registered in his own name. But it is necessary to consider another matter, viz., the effect of a notice given to a company by a cestui que trust or equitable mortgagee of shares in it, and in particular it is necessary to consider whether after such a notice the company can properly decline to permit the registration of a transfer by the registered holder of the shares. It is obvious that the question is one of the utmost importance not only to equitable owners and mortgagees of shares, but also to companies; for whilst on the one hand, if the notice is valueless, an equitable owner or mortgagee will be at the mercy of the registered owner, yet on the other, if the notice operates as a stop on the transfer of the shares, companies must be careful to preserve such notices and not to disregard them. A very onerous duty will be thrown upon companies, for they will in this case not only have to keep a register of shareholders and of transfers, but in some shape or other a register of notices of equitable interests. Now, if we turn to the Companies Act, 1862, we shall find enactments requiring companies governed by it to keep a register of members: ss. 25–37. Moreover, upon the production of a proper transfer duly executed, either a transferor or a transferee can require the company to substitute the name of the transferee for that of the transferor on the register: see Companies Act, 1862, s. 35, and Companies Act, 1867, s. 26. Provision is also made for the registration of holders of share warrants entitling the bearer to be registered as a member (that is, by the Companies Act, 1867, s. 27, and following sections). There is, however, no provision in the Companies Act, 1862, or in any of the Acts amending it, requiring the company to keep any register of, or to preserve any notice of, any change in the equitable interest in shares. On the other hand, s. 30 of the Companies Act, 1862, seems expressly intended to exonerate them from any such duty. That section enacts that "no notice of any trust, expressed, implied, or constructive, shall be entered on the register or be receivable by the registrar." In the face of this enactment it is difficult to hold that companies are bound to pay any attention to notices of equitable interests in shares. They are to be kept off the register, but the enactment is reduced to a mere regulation as to the form of a particular book, if notices of trusts, although kept out of it, are to be preserved elsewhere by companies and are to be attended to by them. I cannot put so narrow a construction on this section. Article 22 of the Tramways Union Company is more emphatic than s. 30 of the Act. It has been read, and I therefore do not deem it necessary to read it again. In the absence of some statutory enactment entitling companies to ignore notices of equitable assignments, it is, to say the least, doubtful whether they can safely do so, even although they may attempt to entitle themselves so to do by agreement or otherwise. That question will be found discussed in *Williams* v. *Thorp.* (1) The section in question appears to me to remove this doubt, and to relieve companies registered under the Companies Act, 1862, from the duty of attending to mere notices of equitable interests.

It must not be forgotten that a cestui que trust or equitable mortgagee of shares who is entitled to restrain a transfer can apply to the High Court under 5 Vict. c. 5, s. 4, and Order XLVI., for an order restraining the company from allowing a transfer to be made, and this appears to me to be his only remedy where he is not himself a transferee, and as such entitled to be registered as a shareholder. I wish to guard myself against being supposed to go too far: I have no doubt that if directors allow a transferor to make a transfer which they know to be fraudulent, they could be made liable for the value of the shares transferred, they would make themselves parties to his fraud. Moreover, a refusal by directors, or an omission on their part, to pay attention to a notice given to them by a person having an equitable interest in shares, and requiring the directors not to register a transfer for such time as may be necessary to allow him time to apply for a proper restraining order, would be primâ facie improper. Such conduct

(1) 2 Sim. 257.

on the part of directors unless explained would be strong evidence of fraud on their part. But this is quite consistent with holding companies not bound to take notice of equitable interests in shares, not followed up by proceedings to restrain a transfer. It is said, however, that in *Ex parte Stewart* (1) Lord Westbury put a different construction on an enactment similar to s. 30 of the Companies Act, 1862. In *Ex parte Stewart* (1) the directors of a company registered under the Companies Act, 1856, borrowed money for the company from its bankers. One of the directors, with the knowledge of the others, deposited the certificates of his shares with the bankers as a security for this loan; and afterwards became bankrupt. The bankers gave no notice of the deposit to the company, but all the directors knew of it; it was one of the conditions of their loan. The Joint Stock Companies Act, 1856, contained s. 19 similar to s. 30 of the Companies Act, 1862, and it was contended by the assignees of the bankrupt that the notice which the directors had of the transaction did not bind the company and was nugatory, and that the shares belonged to the assignees as being in the order and disposition of the bankrupt with the consent of the true owners. Lord Westbury held that this contention could not prevail, for that, having regard to the notice which all the directors had of the deposit of the certificates with the bankers, it could not be said that the shares were in the order and disposition of the bankrupt with their consent. I need not read Lord Westbury's judgment; it will be found at pages 547 and 548. It will be observed that Lord Westbury was careful to point out that the company was not bound to recognise the equitable title of which it might have notice; but he at the same time held, as a matter of fact rather than of law, that the notice involved in the transaction itself excluded the inference that the bankers permitted the bankrupt to continue the apparent owner of the shares. Under the circumstances of the case before Lord Westbury it would have been a gross breach of faith towards the bankers and against their own interests, if the directors had allowed the shares to be transferred to the prejudice of the bankers. Lord Westbury's decision, therefore, was perfectly correct, but it is no authority for the general proposition that a company registered under the Companies Act, 1856 (or 1862) is bound to take notice of the beneficial interests in shares held by its members, or is bound to prevent a transfer by such members, simply because notice of a trust or equitable security is given to the company. I understand Lord Westbury's view to have been clearly contrary to such a proposition. *Ex parte Littledale* (1) and *Ex parte Boulton* (2) shew that if shares in dock and railway companies are equitably assigned or are left standing in the name of a bankrupt, they pass to his assignees under the order and disposition clause if no notice of the assignment is given to the company, but do not so pass if notice is given. In *Ex parte Littledale* (1) the giving of the notice was considered as essential to perfect the equitable title, and as preventing a transfer by the registered shareholder: see 6 De G. M. & G. 734. Now, as the Companies Clauses Consolidation Act contains a section exonerating the companies to which it applies from noticing trusts, (and it did certainly apply to the company in question in *Ex parte Boulton* (2), and probably also to the others,) these cases go a long way. In *Ex parte Littledale* (1), however, the attention of the Court was not called to the trust section, but in *Ex parte Boulton* (2) it was, and it is curious to observe how cautious the Court was. In *Ex parte Boulton* (2) it was contended that the company had notice of the assignment, but the Court held the contrary. There was, therefore, nothing in that case to take the shares out of the reputed ownership of the bankrupt. Knight Bruce, L.J., said: "Whether the security could have been made safe against bankruptcy without a transfer I do not say; a transfer, however, was not promised, intended, or expected on either side." Turner, L.J., went a little further, and says this, which will be found at page 178, "On the other hand it was contended on the part of the respondent that the shares could be equitably mortgaged, and that no notice to the company was required, but that if notice was required there was in this case sufficient notice. It is not necessary, I think, to give any opinion upon the question whether there can be a valid equitable mortgage of railway shares, and I do not mean therefore to give my opinion upon that point, but assuming that such mortgages can be made, I am of opinion that all the requisites which are essential to mortgages of other choses in action must be observed, and that notice to the company was therefore necessary." I understand this observation to mean in substance: "Assume that a notice to the company would have been effectual to take the shares out of the order and disposition of the bankrupt, still, as there was no notice, they were in his order and disposition." The case of *Ex parte Agra Bank* (1) appears at first sight to offer more difficulty. The Court of Appeal there held that shares registered in the name of a bankrupt were not in his order and disposition, inasmuch as the share certificates had been deposited by him with his bankers as a security for a loan, and the directors knew it, although the bankers had given no notice to the company of their security. The Court there came to the conclusion that the directors could not properly have permitted a transfer, and it certainly looks as if the Court thought that the company was bound to recognise the equitable title of the bankers. This may have been so as regards the company then in question. The company was called the San Pedro del Monte Silver Mining Company, and it does not appear under what statute, if any, it was formed. No statutory enactment relating to the non-recognition of trusts was referred to in argument or noticed by the Court. Under these circumstances it would not be safe to take this case as deciding more than that the shares there in question were not in the order and disposition of the bankrupt, inasmuch as the directors knew that the shares were not in fact the bankrupt's property. There are many other decisions on the reputed ownership clause, and its application to shares in companies, but they go no further than those I have noticed. When carefully examined, none of the cases on the reputed ownership clause decide that it is the duty of companies registered under the Companies Act, 1862 (or governed by any other statute containing such a clause as s. 30), to attend to notices of equitable assignments of their shares. In the absence of authority to the contrary, it appears to me that as regards companies registered under the Companies Act, 1862, there is no such duty, and that to decide otherwise would be virtually to render s. 30 of no practical value. It is the duty of such companies to attend to proper transfers but not to notices of equitable titles, or to notices not to transfer given by persons having equitable interests, unless they have obtained or are about to apply for a restraining order under the statute 5 Vict. c. 5, or an injunction. If this view be correct, it follows that there is no room for the application to shares in such companies of the doctrines laid down in *Dearle* v. *Hall* (1), and according to which the assignee of a trust fund or debt must, in order to protect himself, give notice to the trustee or debtor, as the case may be, of the change that has taken place in the right to receive the fund or debt. If after such notice the trustee or debtor pays the original cestui que trust, or creditor, he pays the wrong person, and is liable to pay over again. On the other hand, if no such notice is given, the trustee, or debtor, has no reason for not paying his original cestui que trust or creditor, and the assignee of the trust fund or debt has only himself to blame, if such payment is made and he loses the benefit of the assignment in his favour. It is not difficult to see how similar reasoning can be applied to shares in companies not exonerated from the duty of recognising beneficial interests in their shares; and in *Cumming* v. *Prescott* (2) and *Martin* v. *Sedgwick* (3) the priorities of equitable incumbrances on shares were considered to depend on the priorities of the notices of them given to the companies. *Martin* v. *Sedgwick* (3), as reported, seems to have been erroneously decided, and to be contrary to *Pinkett* v. *Wright* (4), affirmed in *Murray* v. *Pinkett.* (5) But whatever may be the case with respect to shares in companies not governed by the Companies Act, 1862, or by some similar statute, it appears to me that to extend the rule laid down in *Dearle* v. *Hall* (1) to shares in companies which are so governed would be to mistake the principle of that decision, and to impose on companies by judicial decision duties and responsibilities from which the legislature has relieved them. The present case cannot, therefore, be decided against the defendants simply

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(1) 4 De G. J. & S. 543.

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(1) 6 De G. M. & G. 714.

(2) 1 De G. & J. 163.

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(1) Law Rep. 3 Ch. 555.

(1) 3 Russ. 1.
(2) 2 Y. & C. Ex. 488.
(3) 9 Beav. 333.
(4) 2 Hare, 120.
(5) 12 Cl. & F. 764.

on the ground that they and the plaintiffs are both equitable incumbrancers, and that the plaintiffs were the first to give notice to the company of their charge.

It remains to consider what other grounds there are to entitle the plaintiffs to priority. The defendants had the share certificates and they relied on their possession of them, but they left the shares standing in the name of J. M. Walker, and if he had become bankrupt under the Bankruptcy Act, 1869, it is plain that the shares would have passed to his trustee, as being in his order and disposition. Moreover, if he had executed a proper transfer to the plaintiffs, the plaintiffs would have acquired a legal right to have the transfer to them registered, if they gave the company a proper indemnity against the consequences of registering the transfer without the production of the certificate of the ownership of the transferor. The right to the shares passes by the transfer, and the articles of the company do not make the production to the company of the transferor's certificate a condition precedent to the registration of the transfer; and on this point one may refer to *Ex parte Boulton* (1). But by reason of the execution in blank of the transfer to the plaintiffs they had not acquired any legal right to be registered. They are driven therefore to rely on what is called some better equity than the defendants'. In other words, the plaintiffs must prove some conduct on the part of the defendants, which entitles the plaintiffs to priority over them. If the defendants had left the shares in J. M. Walker's name in order that he might deal with them, the plaintiffs would, I think, be entitled to succeed. But the defendants left the shares in J. M. Walker's name not in order that he might dispose of them, but in order that he might continue to hold them. Again, if the plaintiffs had made inquiries of the company and had ascertained that J. M. Walker was the apparent owner of the shares, and had then advanced money to him on the faith of his being the owner of the shares, the plaintiffs' case would have been stronger than it is. But the plaintiffs did not do this; they merely took a blank transfer as the best security they could get for a pre-existing debt. This does not prevent the plaintiffs from being bonâ fide purchasers for value; but as they did not even get the certificates, I doubt whether they can be treated as bonâ fide purchasers without notice. The truth is that they trusted entirely to J. M. Walker. The plaintiffs cannot truly say that they have been misled by the conduct of the defendants. There is no proof that they were so misled, nor that they have been in any way damnified by the fact that the defendants allowed the shares to stand in the name of their mortgagor. The plaintiffs, it is true, sold the shares before they got them or the certificates of them, but the defendants cannot, in my opinion, be held responsible for the loss thereby sustained. It is well settled that as a general rule the purchaser of an equitable interest in property takes it subject to all prior subsisting equitable interests in it, and in my opinion the priorities in this case must be determined by that rule, or, in other words, by the maxim, qui prior est tempore, potior est jure.

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(1) 1 De G. & J. 163.

For the above reasons I come to the conclusion that the plaintiffs have not established any better equity to the shares than the defendants have, and in my opinion the title of the defendants, being the earliest, must prevail. The appeal, therefore, must be allowed, and judgment be entered for the defendants with costs both here and below.

Judgment for the defendants, the executors of James Scott Walker.

Solicitors for plaintiffs: *Michael Abrahams, Son & Co.*

Solicitors for defendants, the executors of James Scott Walker: *Miller, Smith, & Bell.*

J. E. H.

1885
Jan. 30.

SEYMOUR AND OTHERS *v.* BRIDGE.

Principal and Agent—Bank Shares, Contract for Sale of—30 & 31 *Vict. c.* 29, *s.* 1—*Omission to specify Numbers—Brokers' Right to Indemnity—Stock Exchange, Usage of.*

The defendant employed the plaintiffs, who were stockbrokers on the Stock Exchange, to buy shares in a joint stock banking company. He had on many previous occasions employed the plaintiffs to buy similar shares, and on none of those occasions did the contract or advice note forwarded to him specify the distinguishing numbers of the shares purchased. The plaintiffs purchased the shares from a jobber on the Stock Exchange in the usual way, and forwarded to the defendant a contract note in the usual form, stating that the contract was made subject to the rules and regulations of the Stock Exchange. The contract was not made with reference to any distinguishing numbers of the shares, nor did the contract note specify any numbers. It is not the practice on the Stock Exchange to specify the numbers of the shares in dealing in bank shares. The defendant before the settling-day wrote to the plaintiffs repudiating the contract, on the ground that the numbers of the shares were not specified pursuant to 30 & 31 Vict. c. 29, s. 1. Notwithstanding such repudiation, the plaintiffs completed the contract and paid for the shares.

By the rules of the Stock Exchange the committee only recognise the members of the Stock Exchange as the parties to contracts, and if a member does not carry out a contract he may be declared a defaulter and expelled from the Stock Exchange, and "no application, which has for its object to annul any bargain on the Stock Exchange, shall be entertained by the committee unless upon an allegation of fraud or wilful misrepresentation."

The plaintiffs sued the defendant to recover the price of the shares paid by them:—

Held, by Mathew, J., on the authority of *Read* v. *Anderson* (13 Q. B. D. 779), that the plaintiffs were entitled to recover.

ACTION for money paid by the plaintiffs at the defendant's request.

At the trial before Mathew, J., without a jury, the facts were as follows:—

The plaintiffs, stockbrokers upon the London Stock Exchange, were employed by the defendant to purchase fifty shares in the Oriental Bank. The defendant had on many previous occasions employed the plaintiffs as stockbrokers on the London Stock Exchange in buying and selling bank shares, including shares of the Oriental Bank. In none of the contract or advice notes forwarded by the plaintiffs to the defendant in respect of such transactions had the numbers of the shares been specified. On the occasion in question, the defendant having instructed the plaintiffs to purchase the shares for him, the plaintiffs effected a contract for the shares in the usual way with a jobber upon the Stock Exchange, and forwarded to the defendant a contract note in the usual form stating that the contract was made subject to the rules and regulations of the Stock Exchange. The contract was not made with reference to any distinguishing numbers of the shares, and the note did not specify any numbers with regard to the shares purchased. On the 2nd of May, 1884, the day after the contract, the Oriental Bank stopped. On the 6th of May, the defendant wrote a letter to the plaintiffs repudiating the contract, on the ground that the numbers of the shares were not specified according to 30 & 31 Vict. c. 29 (Leeman's Act), s. 1. On the 9th of May the plaintiffs forwarded to the defendant the numbers of the shares, having subsequently to the 6th of May obtained them from the jobbers. Notwithstanding the defendant's repudiation of the contract, the plaintiffs proceeded to carry out the contract with the jobber in the usual way, and having obtained transfers paid for the shares. The defendant refused to accept the transfers or pay for the shares, and the action was thereupon brought by the plaintiffs to recover the price of the shares. It appeared from the evidence that it was not the practice on the Stock Exchange to specify the numbers of the shares, as required by 30 & 31 Vict. c. 29, in dealing in bank shares, or to insert such numbers in the advice or contract notes, it having been found practically impossible to comply with the provisions of the Act, consistently with the exigencies of business.

By the printed rules of the Stock Exchange the committee only recognises members of the House as parties to contracts, and the broker is treated, as between himself and other members of the Stock Exchange, as liable upon the contract as a principal, and if he does not complete it he may be declared a defaulter and expelled from the Stock Exchange. The 58th rule of the Stock Exchange provides that no application which has for its object to annul any bargain on the Stock Exchange shall be entertained by the committee unless upon a specific allegation of fraud or wilful misrepresentation. It appeared that the decision of the committee of the Stock Exchange had been to enforce the bargains against the purchasing brokers in the case of purchases of Oriental Bank shares under circumstances similar to those in the present case.

The defendant in giving evidence admitted that for the period of seven years he had had pretty frequent dealings through the plaintiffs on the Stock Exchange, but stated that he did not, before seeing a certain article in a newspaper on the 5th of May, 1884, know that Leeman's Act required the specification of the numbers in contracts for bank shares, and that he did not know at the time of the transaction in question anything about the rules or customs of the Stock Exchange, though he supposed there must be some rules and customs of the Stock Exchange. He denied that he knew that if he did not pay for the shares the plaintiffs would have to do so.

Finlay, Q.C., and *Horne Payne*, for the plaintiffs. The defendant having employed the plaintiffs to effect for him a contract for the purchase of bank shares upon the Stock Exchange was bound to indemnify the plaintiffs against the consequences of such contract. Upon the facts it must be taken that the plaintiffs were employed to effect the contract according to the rules and customs of the Stock Exchange and in the form in which it was effected, the defendant having had frequent previous transactions of the same sort, which were carried out in the same way. Inasmuch as by the rules and practice of the Stock Exchange the plaintiffs themselves were liable, notwithstanding the provisions of Leeman's Act (30 & 31 Vict. c. 29), to perform the contract, or to be declared defaulters, the plaintiffs were entitled as against the defendant to pay the price of the shares and recover the same from the defendant, although the defendant had repudiated the contract. They cited *Read* v. *Anderson* (1); *Barclay* v. *Pearce*. (2)

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(1) 13 Q. B. D. 779.

(2) Not reported. The question in that case appears to have arisen upon an application under Order XIV., r. 1. It was stated by counsel that in that case, under circumstances similar to those of the present case, the Court of Appeal affirmed the order of the Divisional Court making the leave to defend conditional upon bringing money into Court.

Lumley Smith, Q.C., and *McCall*, for the defendant. By Leeman's Act (30 & 31 Vict. c. 29), s. 1, a contract for the sale of bank shares without specifying their numbers is null and void, and any custom of the Stock Exchange to disregard that enactment is illegal as contravening the policy of the Act. Inasmuch as the contract note only incorporated the specific rules of the Stock Exchange, the defendant is not affected by any practice or usage outside the printed rules of the Stock Exchange of which he was not aware. There is no rule of the Stock Exchange which provides that contracts may or must be made in a manner contrary to the Act of Parliament. The authority given by the defendant to the plaintiffs must, under the circumstances, be taken to have been an authority to effect a legally binding contract. *Read* v. *Anderson* (1) is distinguishable on the ground that in that case both parties knew that the contract authorized to be entered into was merely a wagering contract and would only be binding in honour, whereas here the defendant must be taken to have intended and authorized the plaintiffs to effect a contract so as to be legally binding. *Barclay* v. *Pearce* (2) is not an authority for the present case, the question there being as to the terms on which the defendant should be allowed to defend, and involving no ultimate decision on the rights of the parties. The case of *Neilson* v. *James* (3) expressly decides that it is a breach of the broker's duty, notwithstanding the usage of the Stock Exchange, to make a contract not complying with Leeman's Act. [They also cited *Tomkins* v. *Saffery*. (4)]

Finlay, Q.C., in reply. The contract was not illegal by reason of the numbers not being specified, but only void. There is nothing illegal in entering into such a contract. The decision in *Read* v. *Anderson* (1) is exactly in point.

MATHEW, J. My judgment in this case must be for the plaintiffs. I think that the case is concluded practically by the decision in *Read* v. *Anderson.* (1) The plaintiffs in this case were employed as stockbrokers by the defendant, who had been a customer on many previous occasions, and they were employed, as

(1) 13 Q. B. D. 779.
(2) Ante, p. 462.
(3) 9 Q. B. D. 546.
(4) 3 App. Cas. 213.

appears abundantly from the previous transactions, to act on his behalf, according to the specific rules and regulations of the Stock Exchange.

He professed a certain ignorance upon the subject, and it may be that he did not trouble his head about the matter, if he were ignorant; but, unquestionably, if he had chosen to inquire, he would have ascertained that employing the plaintiffs to act as his brokers on the Stock Exchange imposed upon them the liability of principals as regards the jobbers with whom they dealt. The transaction in question was a transaction in Oriental Bank shares, the plaintiffs being employed by the defendant to purchase a certain number of those shares for him shortly before the stoppage of the bank. They went in the ordinary course and made a verbal bargain with a jobber. The contract note, in accordance with the usage, was immediately afterwards forwarded by the plaintiffs to the defendant. Neither in the bargain between the brokers and the jobber nor in the contract note was there any reference to numbers, and it is said that the absence of the reference to numbers discharges the defendant from all liability to the plaintiffs. But in the first instance he had given them authority to go and pledge his credit to a jobber on the Stock Exchange, and I am satisfied that according to the usage and according to the rules and regulations of the Stock Exchange the plaintiffs were liable to the jobber for the fulfilment of the contract. That appears to me to be manifest from two of the rules that have been referred to, viz., the rule which states that the committee of the House will take no notice of any parties to contracts but the members of the House, and r. 58, which provides that no application which has for its object to annul any bargain on the Stock Exchange shall be entertained by the committee unless upon a specific allegation of fraud or wilful misrepresention. The contract, therefore, that the plaintiffs had entered into on behalf of the defendant was a contract binding between them and the jobber, because there was neither the fraud nor wilful misrepresentation which would have induced the committee to interfere.

The plaintiffs being in that position, and being bound by the rules, which would have entitled the jobber to have them declared defaulters, on the ground that the contract was not carried out, with all the consequences indicated by the rules in case of default, they receive a notice from the defendant that he chooses to rely upon what has been referred to as Leeman's Act. That Act provides that with reference to contracts in shares of joint stock banking companies (I do not repeat all the words), where the numbers of the shares are not specified, contracts shall be null and void to all intents and purposes whatever. The effect is that such a contract would be binding in honour only, and would not be enforceable by action in a court of law.

Did the defendant authorize such a contract to be entered into? I am clearly of opinion that he did, because he had given similar instructions with reference to shares of the same description over and over again to the plaintiffs, and had received contract notes without any reference to numbers. I am aware that he says he did not know of Leeman's Act. I am not concerned to inquire whether he did or not. I have to say what the authority was that he gave, and whether he got what he had authorized should be obtained for him, and I come to the conclusion that when he got this contract note he got what he intended to order the plaintiffs to obtain for him. Having got the contract in that form the rules and regulations of the Stock Exchange come in, to which I have referred, and which bind the plaintiffs either to pay for the shares which they have bought or to indemnify the jobber for any loss in consequence of their not paying, and that contract is one which in accordance with the ordinary course of business on the Stock Exchange is so binding that the consequence to the plaintiffs would be their expulsion from the House as defaulters, or their being made liable by a summary order of the committee in case they did not fulfil the contract which they had entered into. They have been placed in that position, it seems to me, by the authority of the defendant; they have done what he intended should be done; and, having incurred that liability by his authority and on his behalf, they are entitled to look to him for indemnity. I fail to see any distinction whatever between this case and the case of *Read* v. *Anderson*. (1) I must assume that parties dealing in matters of this sort are cognisant of the law, and I must assume that the defendant knew, or might have

(1) 13 Q. B. D. 779.

known, that this contract would not be a binding contract in law unless the numbers were given; just as a man who authorizes another to make a bet for him knows, or must be taken to know, that the contract of which he authorizes the making on his behalf will not be enforceable in a court of law, and yet, if he gives that authority to a person who comes under personal liability by reason of his having to obey the instructions of his principal, he must indemnify that person. It is idle to talk of revoking after the liability is incurred.

Here, when the plaintiffs had been put by the authority of the defendant in a position of liability to the jobber, it occurred to him that it would be very desirable for him, under the circumstances, to get out of his liability in respect of those shares, and he went through the form of informing the plaintiffs that he did not intend to accept the contract, and would not be bound by it. But unfortunately for him that did not in the slightest degree affect the position of those to whom he had given his previous authority. They were bound to the person with whom they dealt upon the faith of his authority, for it appears that the point was submitted to the committee whether or not contracts were enforceable because of this objection which had been raised for the first time, but the committee, acting under the rule to which I have referred, came to the conclusion that they could not interfere, and that the liability of the plaintiffs to the jobber was complete, and they paid accordingly.

The case of *Barclay* v. *Pearce* (1), which has been referred to, and which went to the Court of Appeal, is certainly not a conclusive authority against the defendant, as Mr. Lumley Smith pointed out. I know it is not a conclusive authority, but the point was discussed with reference to *Read* v. *Anderson* (2), and the Court appears to me to have indicated the view, on the authority of *Read* v. *Anderson* (2), that, if the authority of the broker were established in that case, as it has been in this, the principal would be liable to indemnify the broker, and the Court therefore, in that case, refused permission to defend the action except upon the terms of the defendant's securing the amount for which an indemnity was asked. It was as nearly as possible an authority in this case, and none of the facts to which Mr. Lumley

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(1) Ante, p. 462.

(2) 13 Q. B. D. 779.

Smith has referred appear to me to distinguish this case from either *Read* v. *Anderson* (1) or *Barclay* v. *Pearce.* (2)

My judgment, therefore, is for the plaintiffs with costs.

Judgment for the plaintiffs. (3)

Solicitors for plaintiffs: *Godden, Holme, & Co.*

Solicitors for defendant: *Worthington Evans.*

E. L.

Feb. 17.

PERRY AND ANOTHER v. BARNETT.

Principal and Agent—Stock Exchange, Usage of—Bank Shares, Contract for Sale of—Failure to specify Numbers of Shares—30 & 31 Vict. c. 29, s. 1—Broker's Right to Indemnity.

The defendant instructed the plaintiffs, who were stockbrokers at Bristol, to purchase for him shares in a joint stock banking company on the Stock Exchange. The plaintiffs gave directions accordingly to their London agents, brokers on the Stock Exchange, who purchased the shares from jobbers on the Stock Exchange in the usual way, no distinguishing numbers being specified with regard to the shares so purchased. It is not the practice on the Stock Exchange in effecting contracts for the sale of bank shares to specify the numbers, it having been found practically impossible, having regard to the exigencies of business, to comply with 30 & 31 Vict. c. 29 (Leeman's Act), s. 1.

By the rules of the Stock Exchange it is provided that the Stock Exchange shall not recognise in its dealings any other persons than its own members, such members, if they do not carry out contracts, being liable to be declared defaulters and expelled from the Stock Exchange, and that no application to annul a contract shall be entertained by the committee of the Stock Exchange unless upon a specific allegation of fraud or wilful misrepresentation. Before the settling-day arrived the defendant gave notice to the plaintiffs that he repudiated and declined to complete the purchase of the shares, but, the committee of the Stock Exchange refusing to annul the contract, the plaintiffs proceeded to complete the same and pay the price of the shares. The defendant was ignorant of the usage of the Stock Exchange with regard to dealings in the shares of banking companies, and did not know that the purchasing broker was by such usage rendered liable to perform a contract for the purchase of banking shares though void at law under Leeman's Act:—

Held, by Grove, J., that the plaintiffs were not entitled to recover from the defendant the money paid by them as the price of the shares.

Read v. *Anderson* (13 Q. B. D. 779) and *Seymour* v. *Bridge* (ante, p. 460) distinguished on the ground that the defendant in the present case was ignorant of the usage.

ACTION for money paid.

At the trial before Grove, J., without a jury, the facts, so far as material to this report, were as follows:—

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(1) 13 Q. B. D. 779. (2) Ante, p. 462. (3) See next case.

The plaintiffs were stockbrokers carrying on business at Bristol. On the 1st of May, 1884, the defendant called at the plaintiffs' office in Bristol, and gave them a verbal order to purchase 100 Oriental Bank shares for the next account on the Stock Exchange. It was arranged, the 1st of May being a holiday on the Stock Exchange, that the plaintiffs should lodge the order in London by letter, and have the result telegraphed to Bristol. Accordingly on the same day the plaintiffs wrote to Carr Brothers & Smith, their London agents, brokers on the Stock Exchange, requesting them to purchase the shares. On receipt of the letter on the 2nd of May, Carr Brothers & Smith purchased the shares from jobbers on the Stock Exchange, and telegraphed on the same day before twelve o'clock to the plaintiffs, advising them of the purchase. Immediately on receipt of the telegram the plaintiffs sent a memorandum of the fact of the purchase to the defendant's address. The Oriental Bank closed its doors at four o'clock in the afternoon on the 2nd of May, and did not reopen. On the 3rd of May plaintiffs received from Carr Brothers & Smith a letter enclosing the usual contract or advice note. The contract for the purchase of the shares was made verbally by Carr Brothers & Smith with jobbers on the Stock Exchange in the usual way, and was not made with reference to any distinguishing numbers of the shares, nor did the contract note forwarded as above mentioned specify any numbers. The defendant called on the plaintiffs on the 3rd of May, but he declined to receive any contract note, and said that, having heard that the bank had stopped payment, he repudiated the contract; that he had bought shares in a going concern; and that he thought he was in time because he had not received any contract. The plaintiffs, having subsequently carried out the contract and paid the purchase-money for the shares, brought their action to recover the money so paid by them.

It appeared that by the 52nd rule of the Stock Exchange it is provided that "the Stock Exchange does not recognise in its dealings any other parties than its own members, and every bargain, therefore, whether for account of the member effecting it or for account of a principal must be fulfilled according to the rules, regulations and usages of the Stock Exchange:" and by the 58th rule it is provided that "no application which has for its object to annul any bargain in the Stock Exchange shall be entertained by the committee, unless upon a specific allegation of fraud or wilful misrepresentation." It was proved that it was not the practice on the Stock Exchange to make contracts for the purchase and sale of bank shares with reference to the distinguishing numbers of the shares, it having been found impossible, having regard to the exigencies of business, to comply with the requirements of 30 & 31 Vict. c. 29 (Leeman's Act), s. 1. The committee of the Stock Exchange had decided to treat the contract in question, as well as other contracts entered into for the purchase of Oriental Bank shares under similar circumstances, as binding. In the event of a member of the Stock Exchange not carrying out his contract, he is liable by the rules to be declared a defaulter and expelled from the Stock Exchange. It appeared that the defendant had on a previous occasion bought shares in the Oriental Bank on the Stock Exchange, which he shortly afterwards sold again, the purchase and sale of such shares being respectively transacted through a broker in Bristol, who effected the same on the Stock Exchange through his agent, a London broker. In the case of this transaction the contract notes sent to the defendant did not refer to the numbers of the shares. The defendant, however, stated positively in his evidence that he was ignorant of the rules and usages of the Stock Exchange, and that he did not know that the broker was liable according to the rules of the Stock Exchange as a principal on a contract such as that effected in the present case.

Finlay, Q.C., and *Horne Payne*, for the plaintiffs, contended, upon the authority of *Read* v. *Anderson* (1), *Barclay* v. *Pearce* (2), and *Seymour* v. *Bridge* (3), that the defendant, having employed the plaintiffs to effect a purchase of shares on the Stock Exchange, must be taken to have authorized them to effect such purchase according to the rules and usages of the Stock Exchange; that the defendant either knew or must be taken to have known the usages of the Stock Exchange; that the plaintiffs were responsible to their agents, the London brokers, and bound to indemnify them against liability upon the purchase, notwithstanding the provisions of 30 & 31 Vict. c. 29, s. 1; and that, therefore, the defendant was liable to indemnify the plaintiffs against the responsibility so incurred by them. [They also cited *Cory* v. *Patton.* (1)]

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(1) 13 Q. B. D. 779.

(2) Not reported. The question in that case arose upon an application for leave to sign judgment under Order XIV., rule 1, and the Court of Appeal held that the defendant in an action by a broker to recover money paid under somewhat similar circumstances to those of the present case must bring the money into court as a condition of being allowed to defend.

(3) Ante, p. 460.

Lumley Smith, Q.C., and *T. Willes Chitty*, for the defendant, contended that the decision in the cases of *Read* v. *Anderson* (2), *Barclay* v. *Pearce* (3), and *Seymour* v. *Bridge* (4), depended on the fact of knowledge by the defendant that the contract to be effected would not be binding in law, and of the alleged usage by which the plaintiffs were made responsible on such contract; and that, in the present case, the defendant being ignorant of the usage of the Stock Exchange, by which the purchasing broker was made personally responsible on such a contract as was effected, notwithstanding the provisions of 30 & 31 Vict. c. 29, s. 1, the defendant was not liable to indemnify the plaintiffs. [They cited *Robinson* v. *Mollett* (5); *Duncan* v. *Hill* (6); *Grissell* v. *Bristowe.* (7) (8)]

Finlay, Q.C., in reply.

GROVE, J. I have come to the conclusion that knowledge of the alleged usage of the Stock Exchange, with regard to a contract such as this, is essential in order to bring the case within the authority of *Barclay* v. *Pearce* (3) and *Seymour* v. *Bridge.* (4) If I thought that this case came within the authority of a decision of the Court of Appeal, then of course, whatever my own opinion might be, I should feel bound to decide it in accordance with that decision; and, although it might be somewhat doubtful whether I should be absolutely bound by the decision of my Brother Mathew, still I should, I think, feel it my duty to follow it if in point. I think, however, that the present case is distinguishable, and that the defendant is entitled to my judgment on the ground that no knowledge of any such custom of the Stock Exchange as alleged is proved against him. Such knowledge was expressly denied by the defendant, and I believe his evidence in that respect. That being so, the question is whether a person not a member of the Stock Exchange or acquainted with its customs, but an outsider like the defendant, is bound by such a custom without knowledge. I am of opinion that he is not. I think that "if a person," to use the language of Lord Chelmsford in *Robinson* v. *Mollett* (1), "employs a broker to transact for him upon a market with the usages of which the principal is unacquainted, he gives authority to the broker to make contracts upon the footing of such usages, provided they are such as regulate the mode of performing the contracts and do not change their intrinsic character." It seems to me impossible to say that in this case the alleged usage does not change the intrinsic character of the contract. The usage appears to me to be one which treats as a valid legal contract for one purpose that which is no legal contract at all, and one which the defendant could not enforce in law against the other contracting party. The authority given to the broker is to buy so many shares in the Oriental Bank. The broker instructs his agent on the Stock Exchange, who forwards a note which would, to any one unacquainted with the practice of the Stock Exchange, appear to be a note of a legal contract which the buyer could himself enforce against the seller, but it appears that in fact, in consequence of non-compliance with the provisions of Leeman's Act, no valid contract has been effected at all, and therefore the buyer could not, if the shares had risen in value, and the seller had repudiated, have enforced this contract against him at law. It seems to me, under these circumstances, that he does not get what he bargained for, or what he authorized the broker to procure for him. But then it is said that there is a usage of the Stock Exchange, not by which the invalid contract can virtually be made valid, but by which the broker employed by the purchaser may be made personally responsible on the Stock Exchange upon such contract. If the purchaser knew of that, and if he contracted with his agent on that basis, he may be held to be liable, as was done in the case of *Read* v. *Anderson* (1), because he has knowingly changed the position of the agent and made him subject to certain liabilities in consequence of his carrying out an order in the manner in which the person giving the order knew that it would be carried out. But, if the purchaser is ignorant of the usage, and thinks, when he authorizes the broker to effect a contract, that a contract means a contract enforceable at law, can it be said that he is to be affected by that which is not a contract and is not enforceable at law? It seems to me that on this ground there is a broad distinction between this case and the case of *Read* v. *Anderson.* (1)

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(1) Law Rep. 9 Q. B. 577.

(2) 13 Q. B. D. 779.

(3) Ante, p. 469.

(4) Ante, p. 460.

(5) Law Rep. 7 H. L. 802.

(6) Law Rep. 8 Ex. 242.

(7) Law Rep. 3 C. P. 112.

(8) The point was raised by the counsel for the defendant, that upon the evidence given in the case the defendant's contract and the authority given by him to the plaintiffs ought to be taken to be governed by the customs and rules not of the London but of the Bristol Stock Exchange (the two sets of rules and customs not being altogether identical), but, inasmuch as the judgment does not appear to turn on that point, but on the defendant's ignorance of the customs and rules of the London Stock Exchange, it has not been thought necessary to give the details of the evidence in relation to that point.

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(1) Law Rep. 7 H. L. 802, 836.

In *Seymour* v. *Bridge* (2) Mathew, J., appears to me to assume throughout as the basis of his judgment that the defendant there did know, or was to be taken to have known, of the usage. The defendant in that case had had repeated transactions in bank shares, and in such transactions had received contract notes not specifying the numbers of the shares and incorporating the rules of the Stock Exchange, and the learned judge expressly based his decision on the assumption that he either did know, or must be taken as between himself and the plaintiffs from his repeated transactions to have known, of the usage. In this case it appears that the defendant had had one similar transaction previously in bank shares. I cannot from that one transaction assume knowledge of the usage of the Stock Exchange, the defendant having distinctly sworn that he was ignorant of such usage. In the case of *Read* v. *Anderson* (1) Bowen, L.J., in delivering the judgment of the majority in the Court of Appeal, expressly bases his judgment on the fact that by the usage known to both parties the betting agent became liable; and in that case not only was the usage taken to be known to both parties, but the plaintiff had actually effected that which he was authorized to effect. He was not commissioned to make a contract but to make a bet, and I do not think that, in that case, it would be far fetched to assume that the person employing the agent did know that a bet was void at law, because that is common knowledge. The defendant there knew that the agent had made a bet, which was all that he was commissioned to do, and that by the usage the agent would be liable to be dismissed the turf if he did not pay the bet. On the ground that the plaintiff had carried out his authority and that both parties knew of the usage, the majority of the Court held that, though the betting contract was void in the sense that the defendant could not enforce it against the other party, still an obligation was created as between the principal and agent, and the principal was liable to indemnify the agent if the bet was lost and he paid it. It appears to me that in the case of *Barclay* v. *Pearce* (1) the judges of the Court of Appeal certainly assumed knowledge of the usage of the Stock Exchange as the basis of their judgment. I do not see my way to extending the decision in the cases to which I have referred by applying it to a case where, in my opinion, the defendant was ignorant of the usage, and the usage was one which does not merely alter some incidents of the contract, but to my mind wholly changes its intrinsic character, because it substitutes for a valid legal contract a mere honourable engagement between the members of the Stock Exchange. It seems to me that the decision in the case of *Neilson* v. *James* (2) is in many respects favourable to the conclusion at which I have arrived. For the reasons I have stated I think my judgment must be for the defendant.

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(1) 13 Q. B. D. 779.

(2) Ante, p. 460.

Judgment for the defendant. (3)

Solicitors for plaintiffs: *Ley & Lake, for Danger & Cartwright.*

Solicitors for defendant: *Meredith, Roberts, & Mills, for Osborne, Ward, Vassall, & Co.*

(1) Ante, p. 462.

(2) 9 Q. B. D. 546.

(3) See last case.

E. L.

1884
Oct. 25.

THE QUEEN *v.* BIRON.

Justice, Refusal by, to do Act relating to the Duties of his Office—Rule under 11 & 12 Vict. c. 44, s. 5—Mandamus.

The application of the 5th section of 11 & 12 Vict. c. 44, is not confined to cases where the justice requires protection in respect of the act he is called upon to do.

Reg. v. *Percy* (Law Rep. 9 Q. B. 64) not followed.

Motion for a rule ordering a police magistrate to hear and determine an application for a summons upon a charge of libel which it was alleged he had refused to hear and determine.

G. Denman, for the magistrate, on the preliminary question whether the case was one in which such a rule could be granted, cited the case of *Reg.* v. *Percy* (1), in which it was held that the provisions of s. 5 of 11 & 12 Vict. c. 44 (Jervis's Act) only apply where the magistrate needs protection in respect of the act he is called upon to do.

Master Mellor then called the attention of the Court to the case of *Reg.* v. *Phillimore and Another, Justices, and Pilling* (2), in which the Court thought that the decision in *Reg.* v. *Percy* (1) put too narrow a construction on the 5th section of 11 & 12 Vict. c. 44.

The Court (Grove and Smith, JJ.), upon the authority of *Reg.* v. *Phillimore* (2), decided that the argument of the rule on the

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(1) Law Rep. 9 Q. B. 64.

(2) Q. B. D. April 2, 1884.

Reg. *v.* Phillimore and Another, Justices, and Pilling.

Rule calling on the defendants to shew cause why the defendant justices should not hear and determine a certain information which had been laid against the defendant Pilling for unlawfully encroaching upon the highway, or why a writ of mandamus should not issue to the said justices commanding them to hear and determine the information.

Bullen, who had obtained the rule nisi, stated that on moving for it he had directed the attention of the Court to a doubt whether a rule under 11 & 12 Vict. c. 44, s. 5, could be granted or whether a rule for a mandamus was necessary, having regard to a conflict between the cases of *Reg.* v. *Aston* (1 L. M. & P. 491), and *The Queen* v. *Percy* (Law Rep. 9 Q. B. 64).

Lord Coleridge, C.J. After consideration and consultation with my learned Brothers, the result is that we are disinclined to lay down an absolute

1884

THE QUEEN v. BIRON.

merits must proceed, but after hearing such argument ultimately discharged the rule.

Rule discharged.

Solicitors for magistrate: *Hicklin, Washington, & Passmore.*

The applicant in person.

E. L.

HOGG v. BROOKS.

1885 Jan. 30.

Landlord and Tenant—Power to determine Tenancy by delivering written Notice to Tenant — Tenant's Address unknown — Delivery of Notice at demised Premises.

A lease of premises for twenty-one years contained a proviso that it should be lawful for the landlord or his assigns to put an end to the demise at the end of the first fourteen years by delivering to the tenant or his assigns six calendar months' previous notice in writing of his intention to do so. In an action by the assignee of the reversion to recover possession of the premises, on the ground that the demise had been duly determined by notice under the proviso, it appeared that the lessee had disappeared some years previously, after having mortgaged the premises by way of underlease; that his address could not be found, and that written notice to determine the tenancy directed to him had been sent to his last known address, and had also been delivered to the mortgagee and left upon the demised premises:—

Held, that the action could not be maintained, for there was nothing in the circumstances to warrant the plaintiff in serving the notice otherwise than by delivering it to the lessee.

EJECTMENT to recover possession of a shop in Regent Street, Marylebone.

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rule as to when the proceeding should be by a rule under 11 & 12 Vict. c. 44, s. 5, and when by mandamus, but we are not prepared to say that we think *Reg.* v. *Percy* (Law Rep. 9 Q. B. 64) was rightly decided so far as it is to be understood to decide that the Act *only* applies where justices require protection. We are clearly of opinion that such a construction narrows the operation of the statute too much. But also we are not prepared to say that because the statute may apply to other cases than those in which the justices require protection there may not be many such cases where the Court may properly grant a mandamus. Having said this we are ready to take either course.

CAVE and WILLIAMS, JJ., concurred.

Bullen then applied for the rule under 11 & 12 Vict. c. 44, as the cheaper and quicker proceeding.

Pitt-Lewis shewed cause on the merits, and eventually the Court made the rule absolute.

Rule absolute.

Solicitors for applicant: *Pickett & Mytton.*

Solicitors for defendant Pilling: *Stocken & Jupp.*

J. R.

Jan. 30. The case was tried before Mathew, J., without a jury.

It appeared that on the 26th of March, 1870, the Royal Polytechnic Institution, Limited, granted to one Richard Curtis a lease of the premises for twenty-one years from the 24th of June, 1870, and that the lease contained a proviso "that it should be lawful for the landlords, their successors or assigns, to put an end to this present demise at the end of the first fourteen years thereof by delivering to the tenant, his executors, administrators, or assigns, six calendar months' previous notice in writing of their intention to do so." In November, 1873, the plaintiff having become assignee of the reversion in the lease, and being desirous of putting an end to the tenancy, sent a letter by post to a former residence of Curtis, the lessee, informing him that his tenancy would cease at Midsummer next, and also gave a similar notice to the defendant, who was occupier of the premises. The letter to Curtis was however returned, and it appeared that some years previously he had become insolvent after mortgaging the lease to H. W. Purkis, a solicitor, who let the premises to the defendant. Curtis had afterwards disappeared, and the plaintiff endeavoured in vain to find his address, sending a notice to determine the lease directed to him to the address of his brother in London, and also to the address of Mr. Purkis. He also served a similar notice directed to the defendant, to Curtis and to Purkis, upon Purkis and the defendant.

Purkis was called as a witness, and stated though he was unable to produce the mortgage, that he was not mortgagee of the whole term, but that the mortgage was by way of underlease only.

Finlay, Q.C., and *Nicoll*, for the plaintiff, contended, first, that there was evidence that Purkis was assignee of the whole term, or that he had acted so as to induce the plaintiff to believe that he was assignee, so that a notice delivered to him was sufficient to determine the lease; secondly, that service upon the occupier of the demised premises was sufficient: *Blair* v. *Street* (1); thirdly, that Curtis, the lessee, could not by keeping out of the way prevent the plaintiff from determining the tenancy, and that under the circumstances the delivery of the notice at the premises was sufficient.

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(1) 2 A. & E. 329.

E. Clarke, Q.C., and *W. Allen*, for the defendant. The power to determine the lease is regulated by the express terms of the proviso, and nothing but actual service of the notice upon the lessee can put an end to the tenancy. [They referred to Cole on Ejectment, p. 45.]

Mathew, J. The plaintiff as assignee of the reversion seeks to recover possession of premises in Regent Street, which were in 1870 demised by the Royal Polytechnic Institution, Limited, to one Richard Curtis. The lease contained the following clause: "It shall be lawful for the landlords to put an end to this present demise at the end of the first fourteen years thereof by delivering to the tenant, his executors, administrators, or assigns, six calendar months' notice in writing of their intention to do so." It was alleged by the plaintiff that notice had been given in accordance with the terms of the lease, and therefore that he was entitled to recover possession of the premises from the defendant.

Now it appeared that after the lease had been granted to Curtis he had disappeared and that the premises had been let to the defendant by a Mr. Purkis, a solicitor in Lincoln's Inn Fields. The rent had been regularly paid to Mr. Purkis by the defendant, and Mr. Purkis in his turn had paid the Royal Polytechnic Institution and afterwards the plaintiff. The plaintiff, having acquired the interest of the lessors in the reversion, proposed to determine the tenancy, and in the first instance endeavoured to give a notice to Curtis the lessee by leaving the notice at the last known address of Curtis. This notice however was returned, and it was agreed that it never reached Curtis. The plaintiff then served a further notice, directed to the defendant, to Curtis and to Purkis, upon Purkis and the Defendant, but not upon Curtis. The defendant however refused to give up possession, both he and Purkis alleging that the notice was not sufficient under the terms of the lease, and thereupon this action was brought. The evidence given before me sufficiently shews that Curtis shortly after he became tenant of the premises mortgaged them by way of sub-lease to Purkis, who took possession under the mortgage and demised the premises to the defendant. It has been urged on behalf of the plaintiff that although Purkis was a sub-lessee he so acted as to lead the plaintiff to suppose that he was assignee of the lease, and therefore the notice served upon him was sufficient. But upon consideration of the whole evidence I am satisfied that there is no ground for this contention. [The learned Judge examined the evidence, and proceeded :—] It was said that if the plaintiff had taken proper steps there would have been no difficulty in tracing Curtis and serving a notice upon him, and there was evidence that Curtis had been seen very recently in London. However that may be, I have to determine, and it is the only question I have to determine, whether the notice served on the present defendant and served on Purkis is a notice within the terms of the lease, and also whether leaving the notice at the place where Curtis formerly resided was sufficient. I am satisfied that there is no ground for holding it sufficient. The lease makes no provision for any such constructive service, but provides for a direct service of the notice on the lessee or his assigns. Purkis is not assignee, but only a sub-tenant, and the notice could only be served by delivering it to Curtis. This has not been done, and the plaintiff must fail.

Judgment for the defendant.

Solicitors for plaintiff: *Clarke, Rawlins, & Co.*
Solicitors for defendant: *Purkis & Co.*

A. P. S.

BLASHILL, Appellant; CHAMBERS, Respondent.

1884
Dec. 13.

Metropolitan Building Acts—Foundations—Site—Removal of Fæcal, Animal, or Vegetable Matter from Site—By-laws of Metropolitan Board of Works, Construction of—Metropolis Management and Building Acts Amendment Act, 1878 (41 *&* 42 *Vict. c.* 32), *ss.* 14, 16.

By the Metropolis Management and Building Acts Amendment Act, 1878, s. 16, the Metropolitan Board of Works were empowered to make by-laws with respect to "the foundations of houses, buildings, and other erections, and the sites of houses, buildings, and other erections to be constructed after the passing of this Act, and the mode in which and the materials with which such foundations and sites shall be made, formed, excavated, filled up, prepared, and completed for securing stability, the prevention of fires, and for purposes of health." By s. 14 the term "site" is defined to mean "the whole space to be occupied by such house, building, or other erection between the level of the bottom of the foundations and the level of the base of the walls." The Metropolitan Board of Works made the following by-law: "No house, building, or other erection shall be erected upon any site or portion of any site which shall have been filled up or covered with any material impregnated or mixed with any fæcal, animal, or vegetable matter, or which shall have been filled up or covered with dust, or slop, or other refuse, or in or upon which any such matter or refuse shall have been deposited, unless and until such matter or refuse shall have been properly removed by excavations or otherwise from such site":—

Held, that the meaning of the word "site" in the by-law was governed by the interpretation of that word in the Act, so that the by-law did not authorize the Metropolitan Board of Works to direct the removal of fæcal, animal, or vegetable matter in the soil below the level of the bottom of the foundations.

Case stated by one of the metropolitan police magistrates on two complaints preferred by the appellant, the district surveyor of the district of Bethnal Green, East and South Bow, against the respondent.

One complaint charged that the respondent, on the 13th of March, 1884, at Peel Grove, in the parish of Bethnal Green, unlawfully committed breaches of by-law No. 1 made by the Metropolitan Board of Works under the provisions of the Metropolis Management and Building Acts Amendment Act, 1878, by commencing to build on a site and foundations which had been filled up with materials impregnated with animal matter, to wit, some number unknown of dead human bodies, without the said animal matter having first been properly removed.

The other complaint charged that the respondent unlawfully committed breaches of the provisions of the 17th section of the above mentioned Act by not pulling down and removing, after notice to pull down the same, a house, building, or erection, which he, as builder, had begun to construct upon a site and foundations which had not been prepared in accordance with the by-laws made under the Act.

The respondent, a builder, had commenced to build houses upon a piece of ground in a road called Peel Grove, which he held with other land under a building agreement with the owner. This piece of ground formed part of an old private unconsecrated cemetery which was closed by an Order in Council in the year 1855. (1) After the Order in Council all the gravestones were removed, and the cemetery chapel, which stood on the site of the roadway of Peel Grove, was pulled down, and the surface of the ground was raised by depositing thereon builders' rubbish to a depth varying from one to four feet.

In the early part of 1883 the respondent gave notice to the appellant, as district surveyor, of his intention to build upon the piece of ground, and prior to the 8th of May, 1883, the respondent had commenced to make excavations in the builders' rubbish on the ground for the purpose of laying the foundation of the intended buildings. The appellant having inspected the excavations, on the 8th of May, 1883, wrote to the respondent as follows:—

"In reply to your inquiries made when I saw you upon the ground, I beg to say that I shall require you to remove any objectionable matter (as laid down in the by-laws) that may be met with down to the bottom of your foundations. If you interfere with bodies in making your foundations I shall have to take proceedings, and I presume the parish will do the same."

The by-laws referred to in the letter and in the summons are by-laws made pursuant to the 16th section of the Metropolis Management and Building Acts Amendment Act, 1878. The 14th section of the Act, which is the first section contained in Part II., is as follows:—

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(1) As to building on disused burial grounds, see now the Disused Burial Ground Act, 1884 (47 & 48 Vict. c. 72).

"In this part of this Act:—

"The term 'foundations' shall mean the space immediately beneath the footings of a wall. (1)

"The term 'site' in relation to a house, building, or other erection shall mean the whole space to be occupied by such house, building, or other erection between the level of the bottom of the foundations, and the level of the base of the walls." (2)

The 16th section is as follows:—

"The board may from time to time make, alter, vary, amend, and repeal such by-laws as they may think expedient with respect to the following matters; (that is to say),

1. The foundations of houses, buildings, and other erections, and the sites of houses, buildings, and other erections to be constructed after the passing of this Act, and the mode in which and the materials with which such foundations and sites shall be made, formed, excavated, filled up, prepared, and completed for securing stability, the prevention of fires, and for purposes of health . . . . "

The by-law No. 1 is as follows:—

"No house, building, or other erection shall be erected upon any site or portion of any site which shall have been filled up or covered with any material impregnated or mixed with any fæcal, animal, or vegetable matter, or which shall have been filled up or covered with dust, or slop, or other refuse or in or upon which any such matter or refuse shall have been deposited, unless and until such matter or refuse shall have been properly removed by excavations or otherwise from such site. Any holes caused by such excavation must, if not used for a tenement or cellar, be filled in with hard brick or dry rubbish.

"The site of every house or building shall be covered with a layer of good concrete at least six inches thick, and smoothed on the upper surface, unless the site thereof be gravel, sand, or natural virgin soil."

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(1) By the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), sched. 1, par. 8: "The projection of the bottom of the footing of every wall, on each side of the wall, shall be at least equal to one-half of the thickness of the wall at its base; and the diminution of the footing of every wall shall be formed in regular offsets, and the height from the bottom of such footing to the base of the wall shall be at the least equal to one-half of the thickness of the wall at its base."

(2) By the Metropolitan Building Act, 1855, s. 3: "'The base of the wall' shall mean the course immediately above the footings."

"The foundations of the walls of every house or building shall be formed of a bed of good concrete not less than nine inches thick, and projecting at least four inches on each side of the lowest course of footings of such walls. If the site be upon a natural bed of gravel, concrete will not be required."

The respondent in preparing the foundations for the intended buildings formed foundations in the space immediately beneath the footings of the walls of a bed of good concrete eighteen inches thick, and projecting at least four inches on each side of the lowest course of footings of such walls, and covered the whole space to be occupied by the buildings, between the level of the bottom of the bed of eighteen inches of concrete and the level of the base of the walls, with a layer of good concrete twelve inches thick. The bottom of the last mentioned layer of concrete was six inches above the bottom of the bed of eighteen inches of concrete. The site of the intended buildings was covered, and the foundations of the buildings were formed, in accordance with the provisions of the second and third paragraphs of the by-law, if the words "site" and "foundations" are to be construed in the by-law as having the meanings assigned to those words by the 14th section of the Act. The excavations for the foundations and site of the intended buildings were made and the bed and layer of concrete were laid in the builders' rubbish, which had been deposited on the surface of the cemetery as before mentioned, and no portion of the soil which had formed part of the cemetery was moved or disturbed.

It was proved that the natural decay of human bodies might lead to subsidence, so as to form fissures in the concrete, no matter how thick it was, and to the emanation of noxious gases.

It was contended on behalf of the appellant that the meaning of "site" and "foundations" was the natural virgin soil of the earth, and that the taking away of the natural virgin soil to the bottom of the graves and filling the cavity with dead bodies, made the site and foundations lower down to the extent of the depth of the graves than it was before.

It was contended on behalf of the respondent that the meaning of "site" and "foundations" in the by-laws was the meaning placed thereon by the 14th section of 41 & 42 Vict. c. 32, and that if a more extended meaning were given to the words, then the by-laws must be regarded as ultra vires. It was further contended by the respondent that ground in which dead human bodies had been buried was not to be regarded as a site filled up or covered with material impregnated or mixed with any fæcal, animal, or vegetable matter, within the meaning of the words of the by-law.

The magistrate decided that the meaning of the words "site" and "foundations" in the by-law could not be extended beyond that given by the 14th section of the Act, and that the foundations and site had been prepared in accordance with the by-laws under the Act. He was further of opinion that the first paragraph of the by-law above set out, was intended to meet an entirely different state of things, and was not applicable to the present case; because he considered that human bodies buried in coffins could not be said to be "materials impregnated with animal matter." He accordingly dismissed the summons.

The question for the opinion of the Court was whether on the facts as above stated the magistrate was right in dismissing the summons.

Sir H. Giffard, Q.C. (*Besley* with him), for the appellant. One of the main objects of the Act was to prevent the building of insanitary houses. One of the essentials is that the place where the house is built should be free from things which by decomposition would produce an insanitary condition. It is clear that if the ground at this spot sinks, as it is sure to do, the concrete will crack and be no protection, and if the decision of the magistrate is right the object of the Act will fail. The Act ought to be construed, if possible, so as to carry out its objects, and it deals not merely with the things defined as site or foundations but with things ancillary to them. This is shewn by the general words used in s. 16, under which the board may make by-laws as to the mode in which foundations and sites may be made, formed, excavated, filled up, prepared, and completed for securing stability, the prevention of fires, and for purposes of health. Not only is the object named, but the words as to construction apply to much more than the position and fabric of the foundations and sites. If the Act had this scope the by-law of the board was authorized, even if it extends to things outside the "site" and "foundations" defined by the Act.

Gainsford Bruce, Q.C. (*W. Graham* with him), for the respondent. The Act is perfectly plain. It defines foundations and sites, and gives power to make by-laws as to the things so defined. The appellant is in this dilemma, either the board have followed the Act, in which case, as found in the case, their by-law, restricted by the definitions of the Act, has been complied with, or else the by-law extends to something not included in the definitions of the Act, and is ultra vires and void.

Sir H. Giffard, Q.C., in reply.

GROVE, J. In this case I have come to the conclusion that the respondent is entitled to the judgment of the Court.

The question arises on the construction of the 14th and 16th sections of the Metropolis Management and Building Acts Amendment Act, 1878, and certain by-laws made under the authority of the Act. The object of the Act is to provide for buildings which shall be secure in themselves, which shall be free from nuisances, and speaking generally free from anything which would be injurious to health. The ultimate object of the Act, so far as the question for our consideration is concerned, is sanitary. Now it has been argued that we must give effect to that object, and I quite agree to that. But on the other hand we must not read words into the provisions of the Act to meet some difficulty which the Act does not seem to have contemplated, and as to which it creates no provision.

In s. 14 of the Act it is enacted that the term "foundations" shall mean "the space immediately beneath the footings of a wall," that is the lowest part to which any part of the house reaches. We then come to the term "site," which is the more material matter as applied to this case: "The term 'site' in relation to a house, building, or other erection, shall mean the whole space to be occupied by such house, building, or other erection, between the level of the bottom of the foundations and the level of the base of the walls."

I take it the bottom of the foundations means the lowest part which the foundations touch or rest upon. So reading it, what are we to understand by the expression "site"? Not as it seems to me the spaces, not the superficial area of the ground; not the locale, so to speak, where a house is to be built. You may say a house is to be built at Cooper's Hill, or you might convertibly say Cooper's Hill is the site of the house. But the use of the word "site" there is far more extended than in this Act, and would be in that case merely the general locale upon which the house was to be built. Now it seems to me clear that that is not the meaning of the word "site" here. The word or term "site" means what the Act says it means, viz., "the whole space to be occupied by such house, building, or other erection between the level of the bottom of the foundations and the level of the base of the walls." As I read this it means the space which will necessarily be taken up when the house and walls come to be built. I think that is confirmed by further portions of the Act, because the 16th section is conclusive as shewing that the word "site" does not mean merely the general locale on which the house is to be built, but something which can be made, formed, and excavated.

That being so, I now go to the by-law, the interpretation of which is in question in this case. When it was first read, I thought "site" was used in the wide sense of the ground upon which the house was built, but it appears to me that it can be reasonably construed as in s. 14. I do not say that there may not be words in by-laws which are so obviously used in a different sense to the same words in the Act that the Court may properly, reading them with the context, put a different construction upon them; but primâ facie I should say that the proper mode of construction is to apply the same interpretation to terms used in a by-law which is applied to the same terms in the Act under the powers of which the by-law is framed. The words of this by-law are, moreover, fully in accordance with this rule of construction, for the by-law is perfectly intelligible if the words "site" or "portion of a site" used in it be taken to mean, as in s. 14, the space or part of the space occupied by the house between the levels there mentioned. There would still be space whether it were filled with air or with solid matter, but the by-law provides, if it has been filled up or covered with any fæcal, animal, or vegetable matter, that such matter must not be left lying in or on that space, but must be carefully removed by excavation or otherwise, so that none is left on any portion of the site, that is, on any portion of the space to be occupied by the house.

The object of the other two paragraphs of this by-law is clearly to give a solid bed for the foundations to rest upon, which will prevent the house giving way, and to provide a bed of concrete below the house. Concrete, when it hardens, will give a solid foundation, and stability to the house. It will also have an effect upon health, so far as it prevents any infiltration. So that the by-law has a most material bearing upon health, because it provides that the site shall be covered—and there I read the whole site co-extensive with the house—with a layer of good concrete at least six inches thick. This concrete is not for the purpose of bearing weight, like the nine inches of concrete under the walls. It may possibly add to the stability of the building, but it is mainly, if not entirely, to prevent emanations or other matters coming from the lower ground, and so to protect the health of persons inhabiting the houses by having an impermeable stratum six inches thick between them and the ground beneath. Now on what seems to me to be the reasonable construction of the Act, all that which the by-law prescribes has been done, and the learned magistrate who decided this, decided that the Act had been complied with, and I think he was right.

Then there arises this difficulty. The ground in question formed an old cemetery, and coffins and bodies to the depth of some eighteen or twenty feet, and coming not very far from the surface of the soil, had been buried there up to somewhere about the year 1849. Now the board assert the right to have the whole of that excavated and cleared, because it consists of animal matter within the meaning of this Act. I think it does consist of animal matter within the meaning of this Act, because I think it is the sort of refuse animal matter which, had it existed within the space of the site of the houses, would have been required to be cleared away. But we are asked to say that the board had the right to insist upon the parties excavating for the houses to any depth which contains animal matter or vegetable matter. Now, does what they contend for come within the words of the Act? Construing them as I have construed them, and limiting the term "site" to the space occupied by the house and its walls, the contention fails. Then it may be asked, is it not a rational construction to say that the by-law is to be read in a different sense from the Act. I am inclined to think that if the by-law were to be so read it would be bad, because if the Act confines "site" to a limited space, then a by-law which extends the word "site" and gives powers of compulsory legislation over that site beyond and above that which is comprehended by the Act, would be, as I should be inclined to think, bad. I construe the by-law, if I can, ut res magis valeat quam pereat, and certainly the by-law can be quite sensibly construed giving to the word "site" the same definition as contained in the Act. It may be very true, as suggested, and as I am inclined to think, that when this Act was framed, those who had framed it had not in their minds a burial ground. Burial grounds form so very small a part of the whole area of London that they possibly did not think of them. But although that may have been so, I think that the Act and by-law under it, properly read, deal only with the space from the lowest part of the foundations, and upwards from that point to the surface of the soil.

Therefore, upon the whole, I am of opinion that the proper construction of the Act and by-law is as contended now by the respondents and as was contended before the magistrate who decided this case, and that the respondent is entitled to our judgment.

HAWKINS, J. I am also of opinion that the magistrate was right, and that this appeal ought to be dismissed. In reading this Act, it occurs to me, as it has occurred to my Brother Grove, that in all probability the legislature never contemplated the use of old burial grounds when they were framing this particular Act, and I think it equally probable that the Metropolitan Board of Works, when they came to frame their by-laws, lost sight altogether of the fact that there were a great many old disused burial grounds in London, which were the property of private individuals, and might be devoted to building purposes. They certainly have made, in my opinion, no provision for building over such ground, that is to say, no such provision as might have been expected if they had contemplated buildings or houses being erected over these disused places.

Before going to the by-laws, one must ask what was intended by the legislature when they spoke of "a site" and "foundations," and conferred power upon the Metropolitan Board of Works to make by-laws with respect to "a site" and "foundations"? It seems as though the legislature had determined that there should be no question at all upon this part of the case, because, before giving power to make by-laws, they state in express terms what they mean in using the terms "foundations" and "sites." The Act says: "In this part of this Act the term 'foundations' shall mean the space immediately beneath the footings of a wall," that is to say, the foundations upon which the footings of the walls are to rest when the building is constructed and erected, and the foundations are matters which are clearly within the cognizance and jurisdiction of the Metropolitan Board of Works.

There is no question at all as to the meaning of "the footings of the walls," nor as to the meaning of "the base of the walls," when we come to look at the Metropolitan Building Act which was passed in the year 1855. (1) I find in the first interpretation clause of that Act, "The base of the wall shall mean the course immediately above the footings." Then, when I turn to the first schedule of the Act, I find the footings of the wall are dealt with: "The projection of the bottom of the footing of every wall on each side of the wall shall be at least equal to one

(1) 18 & 19 Vict. c. 122.

half of the thickness of the wall at its base, and the diminution of the footing of every wall shall be formed in regular offsets; and the height from the bottom of such footing to the base of the wall shall be at the least equal to one half of the thickness of the wall at its base." So that it prescribes here how the footings shall be constructed, and the depth of them. Therefore, there is no mistake at all as to what the Act of Parliament meant in 1855. But I should think there is equally little doubt what the by-laws intended in making use of the words. I may observe, with reference to the word "foundations," that though the board have power to prescribe and dictate as to the mode in which and the materials with which the foundations shall be composed, this by-law says nothing as to the foundations, except that beneath the last course of the footings there shall be a layer of concrete of a depth of at least nine inches. Now, when you come to look at the case and to the facts which are found in it, the construction of the foundations has been not merely within the strict requirements of the by-law, but even better foundations have been put in than the by-law requires.

Now let me go to the "site." With reference to this I hardly go to the same extent which my Brother Grove has suggested, namely, that "the site" must be construed to be the whole surface of the ground which was intended to be used for the building, that is to say, the whole floor space of the site and the space occupied by the external wall. It is not necessary to determine it, but I should be rather inclined to think that the site was confined to that portion of the house over which the inhabitants were to dwell. However, let us see what the Act of Parliament and the by-laws have said with regard to the site. "The term 'site' in relation to a house or building or other erection shall mean the whole space to be occupied by such house, building, or other erection between the level of the bottom of the foundations"—that is, the bottom of the bed of concrete which is to form the foundation for the wall or for the footings of the wall—"and the level of the base of the walls," that is to say, the site is to consist of the whole space between the lowest level of the base of concrete forming the foundation of the walls and the level of the base of the walls which is the top of the footings. Thus if the footings happen to be, say, a foot in depth, and if there are nine inches of concrete according to the by-laws, there will be one foot and nine inches of interval between the one level and the other, and that site must be made, constructed, and filled up with such materials and in the mode which the Board of Works are entitled to prescribe. Now the Board of Works having power to make provisions with regard to sites, is it not reasonable to suppose that in making the by-law, and using the word "site" they are making regulations with regard to those sites about which by the statute they are empowered to make regulations? Or is it to be supposed that they are exceeding their authority and making rules and by-laws respecting sites which have not been in contemplation of the Act of Parliament, and as to which they had no power to make by-laws? It strikes me that it is reasonable to say that they intended to use the powers conferred upon them, and the powers conferred upon them are limited by the interpretation clause. Now, construing the word "site" in the by-law in that way, what is prescribed with regard to it? It is to be of a depth which is very easily ascertainable, a depth which is equal to the distance between the lowest level of the foundation upon which the footings of the wall rest and the base of the wall which is at the top of those footings. That space which forms the site is to be covered with—by which I understand the top surface of it is to be formed of—six inches of concrete, and from every portion of the site any material impregnated with fæcal, animal, or vegetable matter must be removed. Then what is the fact? The magistrate has found that a six inches layer of concrete has been laid down; and he has found also as a matter of fact, or if it is not directly found it is implied in the language of the case, that no part of the remaining portion of the site, that is, between the lower level of the concrete which covers the site and the level of the base of the foundations, consists of any material which is impregnated either with fæcal or animal or vegetable matter. In short, he has found that if the by-law is to be construed in the way in which I think it ought to be construed, the respondent has done everything that the by-laws require him to do.

I am of opinion, therefore, for the reasons that I have stated, that the magistrate was right in coming to the conclusion that these by-laws had not been infringed, and I think this appeal ought to fail.

Judgment for the respondent.

Solicitor for appellant: *R. Ward.*
Solicitors for respondent: *Collyer-Bristow & Co.*

A. M.

Dec. 17.

THE BROUGHTON AND PLAS POWER COAL COMPANY, LIMITED, APPELLANTS; KIRKPATRICK (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax—Coal Mines—Dead Rent—Royalties—Deductions from Gross Profits—Provision for recouping Dead Rents out of Royalties, Effect of—5 & 6 *Vict. c.* 35, *s.* 60 (*Sched. A*), *r.* 3; *Sect.* 100 (*Sched. D*)—29 & 30 *Vict. c.* 36, *s.* 8.

By an agreement for lease of coal mines for a term of years from March, 1874, the lessees agreed to pay a dead rent for the mines, and royalties at specified rates per ton on all coal worked; the dead rent to be recoupable out of royalties during the first sixteen years of the term—the effect being, that the lessor received on account of his share of the profits of the concern not less than a fixed annual sum; so that when his share of the royalties did not amount to the fixed sum he received that sum; but when his share of the royalties exceeded the fixed sum he received that sum only until the lessees had been reimbursed the excess paid to the lessor when his share of the royalties did not amount to the fixed sum. The lessees worked the mines for the first time in October, 1880, having paid the dead rent, less income-tax, to the lessor up to that year. Upon an assessment to the income-tax, made upon the lessees under Schedule D, for the year 1881–2, it appeared that the lessor's share of the royalties for that year had exceeded the dead rent by the sum of 1477*l.*:—

Held, that, in estimating the profits of the concern for the particular year for the purpose of being assessed under the Income Tax Acts, the lessees were not entitled to deduct the 1477*l.* from their gross profits.

CASE STATED under 43 & 44 Vict. c. 19 (The Taxes Management Act, 1880).

The material facts stated in the case were as follows:—

At a meeting of the special commissioners under the Income Tax Acts, held at Chester, in March, 1883, the appellants, a colliery company, appealed against an assessment made upon them under Schedule D in the sum of 16,000*l.* in respect of the profits of the concern for the year 1881–2.

Upon examination of the accounts the commissioners found that

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the liability of the company for the year ending March 31, 1882, was 5843*l.*, made up as follows:—

		£
Balance of account		2556
Royalty charged		3477
Gatewen royalty		1000
Rent		90
Wayleave		371
Income-tax		50
		£7544
Less Depreciation.	£1400	
Bank interest	301	1701
		£5843

The first item, "balance of account," represented the company's profit, and the subsequent items were added in order to arrive at the total produce of the mine upon which the duty was to be charged.

The commissioners reduced the company's assessment to the above sum of 5843*l.*

The collieries were held by the appellants under an agreement for a lease dated the 30th of September, 1875, by the terms of which the lease was to commence from March 25, 1874, for a term of forty-two years; the dead rent payable to the lessor was to be 1000*l.* a year for the first three years; 2000*l.* a year for the next seven years, and 3000*l.* a year for the residue of the term; the dead rents to be recoupable out of royalties during the first sixteen years of the lease.

The case stated that it was explained to the commissioners that the dead rent and royalties were in fact one and the same payment, and merged together; that the dead rent was a device to secure the lessor against the fluctuations of mining, by which device the lessor received on account of his share of the profits of the company not less than a fixed annual sum, so that when his share of the royalties did not amount to the fixed sum he received that sum, but when his share of the royalties exceeded the fixed annual sum, that sum only was paid to him until the company had been reimbursed the excess paid to the lessor when his share of the royalties did not amount to the fixed sum.

The appellants were registered as a limited company in April, 1880, having previously existed as a private concern. They did not commence working or getting the mines until the 2nd of October, 1880. Assessments were made by the district commissioners under Sched. D of the Income Tax Acts in the years 1878, 1879, and 1880 in the sum of 2000*l.* each year—the amount of the dead rent payable to the lessor in those years, during which the mines were non-productive.

The appellants contended that in estimating the total produce of the mines, in respect of which they were liable to pay income tax for the year 1881–2, the commissioners ought to allow a deduction of the sum of 1477*l.* from the sum of 3477*l.* "royalty charged," the second item in the above statement of the company's liability. The 1477*l.* represented the excess of royalties over dead rent for the year 1881–2.

The commissioners were of opinion that the sum of 1477*l.* was properly included in the assessment, in accordance with 5 & 6 Vict. c. 35, s. 60, No. III., rule 3. (1)

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(1) By s. 8 of 29 & 30 Vict. c. 36: "The several and respective concerns described in No. III. of Sched. A of 5 & 6 Vict. c. 35, shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned, according to the rules prescribed by Sched. D of the said Act, so far as such rules are consistent with the said No. III. . . . ."

No. III. of s. 60 (Sched. A) of 5 & 6 Vict. c. 35, contains: "Rules for estimating the lands, tenements, hereditaments, or heritages hereinafter mentioned which are not to be charged according to the preceding general rule."

"The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited. . . . .

"2nd. Of mines of coal . . . . on an average of the five preceding years, subject to the provisions concerning mines contained in this Act.

"3rd. Of ironworks, &c. . . . . The duty in each of the three last rules to be charged on the person, corporation, company, or society of persons, whether corporate or not corporate, carrying on the concern, or on their respective agents, treasurers, or other officers having the direction or management thereof, or being in the receipt of the profits thereof, on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or the value, either between the different persons or members of

A. Charles, Q.C. (*Clement Higgins* with him), for the appellants. It is admitted that the case is governed by the 3rd rule of No. III. of s. 60 of 5 & 6 Vict. c. 35, and that the destination of the profits of the concern for the particular year is immaterial. But the sum of 1477*l.* is not profit. It should be treated as a sum advanced by the lessees to the lessor, and repaid by him to the lessees under an agreement between the parties. The dead rent is royalty paid in advance. If the lessees are now liable to pay income tax upon the 1477*l.*, the duty on that sum will have been paid twice—once when the dead rent was paid to the lessor whilst the mines were non-productive, and again now when the lessor repays the 1477*l.* to the lessees in order to recoup them in respect of the antecedent payments of dead rent.

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the corporation, company, or society engaged in the concern, or to the owner of the soil or property, or to any creditor or other person whatever having a claim on or out of the said profits."

Sect. 100 (Sched. D) prescribes rules for ascertaining the duties in particular cases mentioned; and with respect to the assessment of any trade, manufacture, adventure, or concern in the nature of trade, not contained in any other schedule of the Act, it is provided as follows:—

"Rule 1st. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure, or concern upon a fair and just average of three years. . . . ."

"3rd. In estimating the balance of profits and gains chargeable under Sched. D., or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from such profits or gains, on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure, or concern, nor for any sum expended for the supply or repairs or alteration of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure, or concern, beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; nor on account of loss not connected with, or arising out of, such trade, manufacture, adventure, or concern; nor on account of any capital withdrawn therefrom; nor for any sum employed, or intended to be employed as capital in such trade, manufacture, adventure, or concern; nor for any capital employed in improvement of premises occupied for the purpose of such trade, manufacture, adventure, or concern; nor on account or under pretence of any interest which might have been made on such sums, if laid out at interest; nor for any debts, except bad debts proved to be such to the satisfaction of the commissioners respectively; nor for any average loss beyond the actual amount of loss after adjustment; nor for any sum recoverable under an insurance or contract of indemnity."

Secondly, it is contended that the lessees are entitled to deduct the dead rent for the previous five years in estimating their profit for the year 1881–2. The dead rent is on the same footing as the ordinary rent of premises used for carrying on business, and the lessees are entitled, by the 2nd rule of No. III. of Sched. A of 5 & 6 Vict. c. 35, to average their profits for the five preceding years.

Sir H. James, A.G. (*Sir F. Herschell, S.G.*, and *A. V. Dicey* with him), for the Crown. By the 3rd rule of No. III. of s. 60 of 5 & 6 Vict. c. 35, profits must be ascertained before paying the landlord anything, and the sum so ascertained is the produce or value of the mine. The moment that a balance is struck between the expenditure incurred in getting the coal and the price there is a value assessable to the income tax, and it matters not in what way that balance is to be distributed, or what its subsequent destination may be.

[SMITH, J. If your contention is well founded, you escape from the decision in *Last* v. *London Assurance Corporation.* (1)]

Here the 1477*l.* is profit; it is part of the produce of the mine for the particular year after deducting expenditure. *Coltness Iron Co.* v. *Black* (2) in principle governs this case. The dead rent paid by the lessees when the mines were not being worked is really capital expended by them. It is money placed to the account of the lessor. *Knowles* v. *McAdam* (3) would have been a strong authority in the appellants' favour, but the House of Lords in *Coltness Iron Co.* v. *Black* (2) dissented from that decision. It is said that the duty on the 1477*l.* will be paid twice; but it will not be paid twice by the same person. The lessor pays the tax upon his profit from the mine—the 2000*l.* dead rent—because, although for convenience of collection the lessees pay it in the first instance, the lessor is bound to deduct it from the next rent. The lessees pay the duty upon this 1477*l.*, which, it is admitted, they have made as profit during the year. It is immaterial that they choose to appropriate it in a particular way under some contract with their landlord.

As to the argument that the lessees are entitled to take a five years' average of their profits, the case finds that they only began to work the mines in 1880, and therefore made no profit in any of the preceding years. In averaging profits you cannot take into account loss where expenditure exceeds receipts in any one year; where there is such a loss the profit must be returned as nil. You cannot deduct a minus quantity in respect of preceding years in estimating average profits.

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(1) 12 Q. B. D. 389; 14 Q. B. D. 239.

(2) 6 App. Cas. 315.

(3) 3 Ex. D. 23.

A. Charles, Q.C., in reply. The case finds that the dead rent and royalties are really one payment, and merged together. The transaction here is wholly different from that in *Coltness Iron Co.* v. *Black* (1), where the decision only was that exhausted capital could not be deducted in estimating profits. That case, therefore, does not apply.

GROVE, J. I am of opinion that the Crown is entitled to judgment, and that income tax must be paid upon the sum of 1477*l.*, in respect of which the appellants claim exemption. The question is not easy of decision. One must look at what is meant in principle by a tax on "profits." In my view the decision of the House of Lords in *Coltness Iron Co.* v. *Black* (1), which virtually overruled the decision in *Knowles* v. *McAdam* (2), was to the effect that "profits" must be taken to mean that which the mine-owner in any given year puts in his pocket, or could, if he chose, put in his pocket, minus the expenditure. He cannot go back and take into account the profit and loss account for a series of previous years. Thus, if a man works his mine at a loss for ten years, and in the eleventh year makes a profit over expenditure, he cannot set off against that profit the antecedent expenses and losses during the years in which he worked at a loss. It would be impracticable to do so. Income tax upon profits could never be assessed without going into an inquiry embracing the whole history of the particular undertaking from its inception. Lord Blackburn in *Coltness Iron Co.* v. *Black* (1) expresses that view very shortly, when he says that you can only look at the profits for the particular year in assessing profits with respect to the income tax.

Here the mine-owners have contracted to pay their landlord a

(1) 6 App. Cas. 315.

(2) 3 Ex. D. 23.

dead rent of 2000*l.* a year, and they have to continue for some years paying that rent though they make no profit whatever. During the time in which they make no profit they pay no income tax, because, although theirs are the hands which pay over the income tax to the Crown on the dead rent, they receive it back from the landlord, who really pays it out of his profits.

I think that the question here is, whether, when the mine has become a profitable concern, the lessees can deduct antecedent losses from the profits of their particular year in respect of which the tax is sought to be imposed. The House of Lords, in *Coltness Iron Co.* v. *Black* (1), have decided in principle that they cannot, and that case seems to me directly in point. It is true that here the lessees claim to deduct antecedent losses from their profits of the particular year under a bargain made with their landlord, by which the dead rent is to be regarded as a payment of 2000*l.* a year out of royalties, if the royalties should amount to that sum; but if they should not, the lessees may apply subsequent royalties in excess of the dead rent to the payment of what are virtually antecedent losses during the years in which the royalties did not reach the amount of the dead rent. But in my view the Crown has no more concern with those antecedent losses than with any other incidental losses which the lessees may have sustained years before—as by the inundation of the mine, or by any other incidental matter which may have made the mine on the whole an unprofitable concern. No authority has been cited for the appellants to shew that lessees of mines are entitled, in estimating the profits of a single year, to deduct any expenses but those expressly allowed by the Act; and, further, by r. 3 of No. III., Sched. A., the duty is charged upon the persons, &c., carrying on the concern "on the amount of the produce or value thereof, and before paying, rendering, or distributing the produce or the value either between the different persons, &c., engaged in the concern, or to the owner of the soil or property." The duty, therefore, becomes due to the Crown as soon as the lessees have determined the profits for the particular year, irrespective of any sums they may have paid to the owner of the soil or property. Such sums cannot be deducted in assessing profits. The only case which creates an apparent difficulty in the matter is *Last* v.

(1) 6 App. Cas. 315.

London Assurance Corporation. (1) In that case the Queen's Bench Division held that a bonus paid by a life insurance company to the persons insuring with them could be treated as an expenditure in reduction of profits in making an assessment for the income tax. The Court of Appeal affirmed the decision of the Court below, though Lindley, J., differed from the two other judges, and agreed with the view taken by my Brother Smith in the Court below. But that case is distinguishable from the present. The decision was based upon the ground that, having regard to the constitution of the insurance company, and the system upon which the concern was ostensibly and really worked, the subscriptions were in fact reduced by the amount of the bonuses paid at irregular intervals, and that the bonuses were, therefore, to be regarded as part of the necessary expenses of working the concern. That is not so here. The terms of the third rule of No. III., Sched. A., with respect to mines shew, to my mind, that it is not intended to be so. The sums representing the excess of royalties over dead rent are not necessary expenses of working the concern, but are sums repayable to the lessees under an agreement with their landlord that they shall, when the working becomes profitable, be allowed to recoup themselves in respect of previous losses. The only distinction between this case and *Coltness Iron Co.* v. *Black* (2) is, that here there was a payment in advance under a bargain with the landlord, whilst in that case there were losses merely which the lessees had incurred by exhausting their capital. I do not think that distinction is material, and, as I have said, I think this case is completely governed by *Coltness Iron Co.* v. *Black.* (2) It is true that in one sense the tax will be paid twice, but it will not be paid twice by the same person. The landlord pays it in the first instance, and he gets the profits upon which he pays. The lessees pay it in the second instance, and they get the profits upon which they pay. The lessees' loss is not in respect of duty paid to the Crown before the mine becomes profitable, but it is an antecedent loss in the course of working the mine, and therefore comes within the principle of the decision of the House of Lords.

With respect to the contention for the appellants that they were entitled to take an average of five years in estimating profits, I think that is disposed of by the fact that this was the first year in which the mine was worked.

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(1) 12 Q. B. D. 389; 14 Q. B. D. 239.

(2) 6 App. Cas. 315.

For these reasons I am of opinion that the Crown is entitled to judgment for an assessment of income tax upon the sum of 1477*l.* in dispute.

SMITH, J. I also think that judgment should be given for the Crown.

In substance, by the agreement of September, 1875, it was provided that, should the mine become a profitable concern, the lessees might recoup themselves out of profits the dead rents which they had theretofore paid to the lessor. Nothing was done in the mine till 1880, when a company was formed to take over what had previously been the private undertaking of the lessees, and down to that date the lessees had paid in pursuance of their contract—first, 1000*l.* a year for three years, and subsequently 2000*l.* a year in respect of dead rent. The company, as I understand, had paid one sum of 2000*l.* for dead rent.

The company began to work the mine in October, 1880. Until that date there had been no working of the mine. The case finds that by the output of the mine in the year 1881–2, the company made a gross sum of 7544*l.*—net 5843*l.* They therefore converted coal into money to the extent of 5843*l.*, and, excepting as regards the question of the dead rent, it is not suggested that the 5843*l.* would not be profit, but it is said that by the contract between lessor and lessees they are entitled to deduct the sum of 1477*l.*—part of the 3477*l.* royalties—as a sum overpaid in respect of royalties before the year in question. It is said that income tax would be paid twice over in respect of that 1477*l.* if the company were liable to pay it now. I think it would, but it would not be paid twice over by the company, because when they paid the dead rent to their lessor, they paid it in each year minus the income tax. What is the 3477*l.*, primâ facie, but profit? It is money which they have made by carrying on the concern. It was argued that the 1477*l.* should be treated as a sum which, under the contract between the parties, the lessees had contracted to pay in advance to the lessor. But I am of opinion that the contention for the Crown is well founded, namely, that the 2000*l.* a year dead rent ought rather to be treated as money placed to the landlord's account. It is very much like a premium paid to him. The real question is, what is the value of the profits which the company received in the year 1881–2? They received net, 5843*l.* I think that the case of *Coltness Iron Co.* v. *Black* (1), and especially the judgment of Lord Penzance, shews that this sum of 1477*l.* is not a rebate which the company were entitled to take off from that which they have received from the working of the concern. I am therefore of opinion that the whole of the sum of 3477*l.* is assessable to the income tax, and that the appellants are wrong in saying that that sum should be reduced by deducting 1477*l.*

Judgment for the Crown.

Solicitors for appellants: *Meredith, Roberts, & Mills.*

Solicitor for the Crown: *The Solicitor of Inland Revenue.*

W. A.

Dec. 15.

SCOTT *v.* THE GREAT AND LITTLE CLIFTON SCHOOL BOARD.

Corporation—Contract with—Not under Seal—School Board—Appointment of Architect—Orders to—Minutes of Board duly signed—Validity—33 & 34 *Vict. c.* 75, *s.* 30, *sub-ss.* 1, 4, 6—*Sect.* 35—*Third Schedule*, 7.

By 33 & 34 Vict. c. 75 (the Elementary Education Act, 1870), s. 30, sub-s. (1), "a school board shall be a body orporate . . . . having a perpetual succession and a common seal . . . ." sub-s. (4) any minute made of proceedings at meetings of the school board, if signed by . . . . the chairman . . . . shall be receivable in evidence in all legal proceedings without further proof . . . . sub-s. (6) the rules contained in the third schedule shall be observed.

By s. 35 a school board may appoint a clerk and a treasurer and other necessary officers . . . .

By the Third Schedule, 7, the appointment of any officer of the board may be made by a minute of the board, signed by the chairman of the board, and countersigned by the clerk (if any) of the board, and any appointment so made shall be as valid as if it were made under the seal of the board.

By a minute signed by the chairman of a school board and countersigned by the clerk, the plaintiff was appointed architect of the board, and under orders given by subsequent minutes so signed and countersigned and communicated to him, he prepared plans for the board:—

Held, that by virtue of the provisions of the Act he was entitled to recover payment for his services although the appointment and orders were not under seal.

FURTHER CONSIDERATION.

The question in the case was whether the plaintiff, an architect, appointed by resolution and a minute signed under 33 & 34 Vict. c. 75 (the Elementary Education Act, 1870), could recover payment from the defendant school board for plans prepared by him under orders agreed to by resolution and duly recorded in the minutes of the board although not under seal.

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(1) 6 App. Cas. 315.

1884. Nov. 22. *Gully, Q.C.*, and *Henry*, for the plaintiff, contended that the work was necessary for the purposes for which the corporation was created, and as the work had been done and the whole consideration for payment executed the defendants could not maintain their refusal to pay on the ground that the contract was not under seal: *Clarke* v. *Cuckfield Union* (1); *Nicholson* v. *Bradfield Union* (2); *Haigh* v. *North Brierley Union* (3); *Sandars* v. *St. Neots' Union* (4); that *Hunt* v. *Wimbledon Local Board* (5) and *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa* (6), turned on the Public Health Act, 1875, s. 174, which required that every contract exceeding 50*l.* should be under the seal of the urban authority, whereas there was no such provision in the Elementary Education Act; and further, that the plaintiff was a necessary officer, duly appointed under that Act (33 & 34 Vict. c. 75), s. 35, by a minute of the board signed by the chairman and countersigned by the clerk: schedule III. r. 7, and therefore the appointment was by the express terms of s. 35 "as valid as if it were made under the seal of the board." *Eaton* v. *Basker* (7) was also cited; and *Lamprell* v. *Billericay Union* (8); *Homersham* v. *Wolverhampton Waterworks Co.* (9); *Diggle* v. *London and Blackwall Ry. Co.* (10); and *Paine* v. *Strand Union* (11) distinguished.

Mattinson (*C. Russell, Q.C.*, with him), for the defendants, relied on the authorities shewing that a corporation is not bound to pay money upon any contract, although upon an executed consideration, even although they should adopt the contract by resolution or minutes, if the contract is not made or ratified by the corporate

(1) 21 L. J. (Q.B.) 349.
(2) Law Rep. 1 Q. B. 620.
(3) E. B. & E. 873.
(4) 8 Q. B. 810.
(5) 4 C. P. D. 48.
(6) 8 App. Cas. 517.
(7) 7 Q. B. D. 529.
(8) 3 Ex. 283.
(9) 6 Ex. 137.
(10) 5 Ex. 442.
(11) 8 Q. B. 326.

seal: *Arnold* v. *Mayor of Poole* (1), *Hunt* v. *Wimbledon Local Board* (2), *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa* (3), and the cases therein cited. He also argued that the provisions of the Education Act (33 & 34 Vict. c. 75) applied only to permanent officers, such as the clerk, treasurer, and teachers mentioned in s. 35.

Cur. adv. vult.

1884. Dec. 15. MATHEW, J. In this case the plaintiff, who is an architect, sued the school board for the district of Great and Little Clifton to recover payment for services rendered by him in preparing plans for the defendants' schools and superintending their erection.

The defendants denied their liability, and by counter-claim sought to recover damages from the plaintiff for negligence in the performance of his duties as architect.

At the trial it was agreed by counsel that the counter-claim should be abandoned, and that the sole question in the cause should be whether or not the defendants were liable for the plans upon which the defendants' schools were erected, the defendants insisting that the orders given the plaintiff were not binding upon them as they had not been formally issued under the seal of the board. It was arranged that if the liability of the defendants was established the judgment should be entered for 90*l.* Upon the argument of the case on further consideration, the cases on the subject of contracts by corporate bodies, from *Clarke* v. *Cuckfield Union* (4) down to *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa* (3), were discussed at length, and the defendants relied upon such of the cases as afforded instances of the strict application of the rule in favour of corporations. Although by s. 30 of 33 & 34 Vict. c. 75, a school board is a body corporate with a perpetual succession and a common seal, further provisions are made with reference to the proceedings of the board which would seem to render the cases relied upon by the defendants inapplicable. The board is a representative body, intended to provide at meetings of its members for the conduct of the

(1) 5 Scott, N. R. 741.

(2) 3 C. P. D. 208; 4 C. P. D. 48.

(3) 8 Q. B. D. 579; 8 App. Cas. 517.

(4) 21 L. J. (Q.B.) 349.

affairs of the board, and to have the proceedings at such meetings duly recorded by minutes, which by s. 30, sub-s. 4, are made receivable in evidence in all legal proceedings without further proof. In this case the orders given the plaintiff were agreed to by resolution of the board and were duly recorded in the minutes. If it were necessary for my decision I should hesitate to regard the cases relied upon by the defendants, where contracts by corporate bodies were held to require to be under the common seal, to be a safe guide in the present case (or indeed in any other case), where the contract was for a purpose incidental to the performance of the duties of the corporate body, and its necessity was shewn by proof that the corporation, with full knowledge of its terms and of all the facts, had acted upon and taken the benefit of its performance. With respect to school boards, the purpose intended to be served by requiring the seal of a corporate body to be used would seem to be secured by other means under the statute in question. But I think that the plaintiff is entitled to recover on another ground, viz., by virtue of the provisions of s. 30, sub-s. 6, and the regulation contained in the third schedule of the Act. By r. 7 in the schedule "the appointment of any officer of the board may be made by a minute of the board, signed by the chairman and countersigned by the clerk (if any) of the board, and any appointment so made shall be as valid as if it were made under the seal of the board." The plaintiff was duly appointed architect to the board under a minute signed by the chairman of the board and communicated to the plaintiff by the clerk of the board, and the subsequent orders for the execution of the plans were given by minutes of the board properly signed and communicated in a similar manner. It was contended for the defendants that an architect was not such an officer of the board as was contemplated by the regulation, inasmuch as it could not be supposed that his services were intended to be more than temporary. I cannot adopt this construction. By the terms of the minute the plaintiff was appointed the architect of the board, and although after the erection of the schools in the Clifton district his duties might not be onerous, there was no reason to suppose that it was intended that he should not continue to act whenever his services

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SCOTT v. CLIFTON SCHOOL BOARD.

were necessary. Further, the regulation is intended to be one of general application, and in large towns where there were many schools there might well be the necessity for the appointment of an architect as a permanent official of the board. On these grounds I give judgment for the plaintiff, with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Wood & Wootton.*

Solicitors for defendants: *Speechly, Mumford, & Landon.*

J. R.

Dec. 18.

LYNCH, APPELLANT; WHEATLEY, RESPONDENT.

Parliament—Registration—Qualification in List—Mistake in Statement of—Correction—41 & 42 *Vict. c.* 26, *s.* 28, *sub-s.* 12.

The qualification of a voter was stated in the third column of the list to be "offices, successive occupation," and in the fourth column "High Street and Charles Street," whereas it was proved that during the whole of the qualifying period he had occupied one office only, namely, in High Street, and would have had by reason of such occupation a good and sufficient qualification. The misdescription was an error of the overseers:—

Held, that the revising barrister had power under 41 & 42 Vict. c. 26, s. 28, to correct the mistake, and should have amended the list by striking out the words "successive occupation" and "Charles Street."

CASE stated by the revising barrister for the borough of Cardiff.

Objection was taken to the name of Harry Francis Lynch Blosse being retained in the parliamentary and municipal list of voters for the parish of St. John the Baptist, west ward, in the borough.

The name of the voter appeared in the list as under:—

No.	Name of Voters in full, Surname being first.	Place of Abode.	Nature of Qualification.	Name and Situation of Qualifying Property.
48	Blosse, Harry Francis Lynch	Gabalva House Cathedral.	Offices, Successive Occupation.	High Street and Charles Street.

It was proved that during the whole of the qualifying year

Blosse had occupied one only of the specified offices, namely, that in High Street, and would have had, by reason of such occupation, a good and sufficient qualification had it been so described on the list.

It was further proved that the misdescription occurred solely through the overseers of the parish erroneously believing that Blosse had occupied an office in Charles Street during the latter part of the qualifying year, and that he had not continued in uninterrupted occupation in High Street (as the fact was) during the whole of the said period.

Acting on this erroneous impression, they by the said mistake so described the qualifying property as it appeared in the list.

Blosse had not sent in any declaration for correcting misdescriptions under 41 & 42 Vict. c. 26, s. 24, nor had he made any claim to have his name inserted in the list in respect of his occupation during the whole of the qualifying year of the said office in High Street only. The revising barrister was thereupon asked to amend the description in the third and fourth columns by striking out the words "successive occupation" in the third column, and also by striking out the words "and Charles Street" in the fourth column.

He was of opinion that to make the required amendment would be to make a change in the description of the qualification which he was not at liberty to make, and he therefore held the objection fatal and declined to amend. The name was accordingly expunged by him from the list of voters.

If the Court should be opinion that his decision was right, the said list was to remain as revised, if the decision was wrong the name was to be restored in the list with or without amendment as the Court should think fit. (1)

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(1) By 41 & 42 Vict. c. 26, s. 28 (1) a revising barrister shall correct any mistake which is proved to him to have been made in any list; (12) where the matter stated in a list or proved to the revising barrister in relation to any alleged right to be on any list, is in the judgment of the revising barrister insufficient in law to constitute a qualification of the nature or description stated . . . but sufficient in law to constitute a qualification of some other nature or description, the revising barrister, if the name is entered in a list for which such true qualification in law is appropriate, shall correct such entry by inserting such qualification accordingly.

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McConnell, for the appellant. The claimant had a good and sufficient qualification by reason of his having occupied an office in High Street which is described in the list. The error of the overseers in making an addition thereto can certainly be corrected under 41 & 42 Vict. c. 26, s. 28.

[LORD COLERIDGE, C.J. This case seems quite clear, at least after the decision of the Court in *Ford* v. *Hoar* (1). Can the respondent shew that the case is not within sub-s. 12 ?]

D. Brynmôr Jones, for the respondent. The facts are the converse of those in *Porrett* v. *Lord* (2), but the decision applies. In that case the qualification on the list was one house, 8, Birley Place, whereas the actual qualification of the claimant was his occupation in succession of two houses, Nos. 8 and 9, Birley Place. The Court held the revising barrister was right in expunging the name of the claimant. Here the list describes houses in succession, whereas the true qualification is one house only. Sect. 28, sub-s. 12, does not apply to this case, for here the matter stated in the list, although erroneously, was not "insufficient in law to constitute a qualification of the nature or description stated." If that sub-section applied to this case, it would extend to nearly all others.

Sub-s. 13 enacts that except as herein provided, and whether any person is objected to or not, no evidence shall be given of any other qualification than that which is described in the list . . . nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same. The revising barrister had therefore no power to take into consideration any evidence of a different qualification to that in the list.

LORD COLERIDGE, C.J. I have no difficulty whatever in this case. It seems to be distinctly within 41 & 42 Vict. c. 26, s. 28, sub-s. 12, and after the elaborate discussion of the subject to-day, I need say no more than that I am clearly of opinion that the amendment could have been made and rightly made.

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(1) Post, p. 507.

(2) 5 C. P. D. 65.

STEPHEN, J. This case is more plain than that in which the Lord Chief Justice differed from us.

CAVE, J. I am of the same opinion.

Judgment for the appellant. (1)

Solicitor for appellant: *Thomas.*
Solicitor for respondent: *Wheatley.*

J. R.

FORD, APPELLANT; HOAR, RESPONDENT.

Dec. 18.

Parliament—Registration of Voters—Revision of List—Description of qualifying Property—Houses in Succession—Omission of One—Mistake—Amendment—41 & 42 *Vict. c.* 26, *s.* 28.

The nature of the qualification of a voter was described on the parliamentary list as "Dwelling houses in succession," and the name and situation of the qualifying property were described in the fourth column of the list as "44, Oxford Street and 34, Prospect Place, Cowick Street." He had, in fact, occupied three houses in succession during the qualifying period, but the overseer by mistake omitted to specify the third house, viz. 31, Prospect Place, and the occupation of the two only as they appeared on the list was insufficient to give the vote. These facts were proved before the revising barrister, and he was asked to amend the fourth column, and did so by striking out the figures "44" and "34":—

Held, by Stephen and Cave, JJ. (Lord Coleridge, C.J., dissenting), that under 41 & 42 Vict. c. 26, s. 28, the revising barrister had power to correct the mistake, although it should not have been corrected by striking out the numbers, and that the list should be amended by inserting "and 31" after the words "Oxford Street" in the fourth column of the list.

CASE stated by the revising barrister for the city of Exeter.

The respondent's name appeared in Form H for the parish of Saint Thomas the Apostle of the list of voters as the occupier of dwelling-houses in succession, and the entry and description on the said list were as follows:—

Name of Voter.	Place of Abode.	Nature of Qualification.	Name and Situation of qualifying Property.
Hoar, William.	34, Prospect Place, Cowick Street.	Dwelling-houses in succession.	44, Oxford Street, and 34, Prospect Place, Cowick Street.

The appellant duly objected to the name of the respondent

(1) See next case.

being retained on the list, upon the ground (inter alia) that the respondent had not been in occupation of the premises as described therein for the period and at the time required by law to give him a vote.

The following facts were proved:—

The respondent had occupied during the whole of the qualifying period three houses in immediate succession, namely, Nos. 44, Oxford Street, and 31 and 34, Prospect Place, Cowick Street, and his occupation of those three houses, and not of the two houses only which are specified on the list, gave him a complete qualification of the nature specified in the third column of the list. The overseer well knew that the respondent had occupied the house 31, Prospect Place, Cowick Street, between his occupation of 44, Oxford Street and his present house, but the overseer accidentally and by mistake omitted to specify the intermediate house, 31, Prospect Place, in the description of the qualifying property, and the part only of the qualifying property as it appeared on the list was insufficient to give the vote.

Upon proof of the above facts the revising barrister was asked, on behalf of the respondent, to amend the fourth column of the list by striking out the figures 44 and 34, which stood before Oxford Street and Prospect Place respectively, and to retain the name of the respondent in respect of his qualification, which consisted of his occupation of three houses, as stated above.

It was contended by the appellant that the revising barrister had no power to make that amendment, as by so doing he would be making the qualification of the voter (the respondent) to consist of an occupation of three houses in succession instead of two houses only, as specified on the list.

The revising barrister held that he had power under the 28th section of the Parliamentary and Municipal Registration Act, 1878, to make the amendment as requested, and he struck out the figures 44 and 34 in the fourth column of the list, and he received proof of the successive occupation by the respondent of the said three houses, being of opinion that by so doing he (the revising barrister) was not altering the nature of the qualification inserted on the list, nor the situation of the qualifying property, but merely correcting an omission accidentally and by mistake made by the overseer in making out the list, and he retained the name of the respondent on the list of voters for the said city.

If the Court should be of opinion that the decision was wrong, the register was to be amended by striking out the name of the said William Hoar from the list.

Bompas, Q.C., for the appellant. The qualification of the voter was the successive occupation of three houses, whereas the description of his qualification on the list shews an occupation of two only. His occupation of the two houses specified in the fourth column had not been long enough to entitle him to vote. The omission of the third house in which he had lived was a mistake which the revising barrister had no power to correct. The Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26, s. 28), reiterates with a very slight and immaterial change of phrase the language of 6 Vict. c. 18, s. 40. Both Acts provide that the revising barrister shall correct any mistake which is proved to him to have been made in any list; but in both Acts there is a proviso that "no evidence shall be given of any other qualification than that which is described in the list," and that he shall not "be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same": 6 & 7 Vict. c. 18, s. 40; 41 & 42 Vict. c. 26, s. 28, sub-s. 13. The only difference of phrase is that for the words "provided always," which introduce the prohibition in s. 40 of the former Act, the words "except as herein provided" are substituted in the Act of 1878. The difference is verbal, and does not affect the meaning of the legislature. Therefore the decisions on the former Act apply to the present case, and decide that no amendment could be made of the 4th column. In *Bartlett* v. *Gibbs* (1) the qualification was stated to be "House" in "East Street," whereas the qualification was two houses, viz. No. 10, East Street, and No. 16, West Street, and the Court of Common Pleas held that the revising barrister could not add the other house. So in *Onions* v. *Bowdler* (2); and in *Porrett* v. *Lord* (3), where the statement in the list was "House," "8, Birley Place"; but the true qualification was houses

(1) 5 M. & G. 81. (2) 5 C. B. 65. (3) 5 C. P. D. 65.

in succession, 8 and 9, Birley Place, and the Court held the revising barrister was right in expunging the name of the voter from the list.

The powers of amendment are limited to cases where that which was intended to be described in the list is put in but imperfectly described. But the powers do not extend to enabling a voter who has stated in the list "I have lived in one house" to have the list amended so as to shew that he has lived in another house. Here, as in *Onions* v. *Bowdler* (1), it is sought to add another house, and it matters not whether it be a second house or a third that is to make up the qualification, it cannot be added. The recent decisions in *Adams* v. *Bostock* (2) and *James* v. *Howarth* (3), do not apply to any such alteration as was made in this case. The words in sub-s. 13, "except as herein provided," only refer to the preceding sub-s. (12).

Secondly: The revising barrister was asked to add "No. 31 &" but instead of doing so he struck out the two numbers already inserted although the houses in the street were numbered. Such mode of amendment was certainly wrong.

[THE COURT. But if we thought he ought to have amended we may correct his decision as to the mode of amending.]

But he says in the case that if his decision was wrong the register is to be amended by striking out the name.

[LORD COLERIDGE, C.J. The revising barrister cannot limit our powers by so stating the case.]

J. Rose, for the respondent, was asked by the Lord Chief Justice to endeavour to distinguish the case from that of *Bartlett* v. *Gibbs.* (4)

In *Bartlett* v. *Gibbs* (4) the mistake was not made by the overseer, and even the nature of the qualification was wrongly stated as "House," whereas the appellant had occupied two houses in succession. Tindal, C.J., said the question was "whether his qualification to vote consisted of his occupation of the house in East Street, *or* of his occupation in immediate succession of the two houses described in the case." (5) The change of the nature of the qualification was the ratio decidendi there, although no doubt the point presented to the Court was on the 4th column. And that "house" in the third column cannot be changed to "houses in succession" is now established by *Porrett* v. *Lord.* (1)

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(1) 5 C. B. 65.

(2) 8 Q. B. D. 259.

(3) 5 C. P. D. 225.

(4) 5 M. & G. 81.

(5) 5 M. & G. p. 94.

[He was stopped.]

CAVE, J. I am of opinion that this appeal ought to be dismissed, because in my judgment the case comes within the plain language of the Act with which we have now to deal. The Act was passed in 1878, "to amend the law relating to the registration of voters in parliamentary boroughs, . . . and relating to certain rights of voting and proceedings before and appeals from revising barristers," and it undoubtedly does in some parts correct decisions in revision cases on other sections of the previous Act.

By s. 28. "A revising barrister shall, with respect to the lists of voters for a parliamentary borough . . . perform the duties and have the powers following: (1.) He shall correct any mistake which is proved to him to have been made in any list;" the list, of course, is the work of the overseer, and the section says in terms that the revising barrister *shall* correct any mistake. It seems to me that upon the facts stated there clearly was a mistake made in this list, and therefore he was bound to correct it, unless we can find that somewhere else in that statute the power thereby given or the duty thereby imposed is limited. For the purpose of shewing a limitation we are referred to sub-s. 13, "Except as herein provided, and whether any person is objected to or not no evidence shall be given of any other qualification than that which is described in the list or claim, as the case may be, nor shall the revising barrister be at liberty to change the description of the qualification as it appears in the list except for the purpose of more clearly and accurately defining the same." The sub-section begins with the words "Except as herein provided," which I take to refer to the whole section, and to mean "except in cases where it is so provided by this section, the description of the qualification is not to be changed." But if that is the right meaning of sub-s. 13 it does *not* cut down sub-s. 1, which therefore must have its full force and effect. It is said that the words

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(1) 5 C. P. D. 65.

"except as herein provided" must be referred—not to the whole section but—only to sub-s. 12, and that the revising barrister can only change the qualification where it is proved to be insufficient *in law*. In the first place, that does not seem to be the true meaning of the words "except as herein provided;" and, secondly, I am quite unable to reconcile that construction with s. 24, which provides that any person who is entered on any list, and whose name or place of abode, or the nature of whose qualification, or the name or situation of whose qualifying property is not correctly stated in such list, or in respect of whom there is any other error or omission in the said list may make a declaration; that clearly covers what has taken place here. The nature of the qualification is accurately stated "Houses in succession;" but the 4th column is incorrect, because 31, Prospect Place, is left out. What is he to do? To make a *declaration* and send a copy to the revising barrister, who is bound to receive it as evidence. But, unless the revising barrister has power to make the alteration, what can be the use of giving the voter the trouble of making a declaration which is utterly valueless, and might yet subject him to imprisonment should the statements in the declaration be untrue. It was said that s. 24 is confined to mistakes in the list. So is sub-s. 1 of s. 28; and s. 24 throws valuable light on sub-s. 1 of s. 28, and shews that it was under sub-s. 1 intended to empower the making of such an alteration as in my opinion might be made in the present case. The legislature meant to enable a voter to make a statutory declaration and get a mistake of the overseers amended, without putting the voter to the trouble or expense of going before the revising barrister and proving in the ordinary way by oath vivâ voce that a mistake had been made.

If the matter rested there it would be perfectly plain. The only difficulty arises from *Bartlett* v. *Gibbs* (1), decided on the Act which was previously in force; and from the high reputation of the Court which gave the decision it deserves to be treated with the greatest respect. But it appears to me that the Act on which that decision was pronounced differs from the Act of 1878 in many particulars which render the case inapplicable. Sect. 40 of the Act of 1843 provides that the revising barrister shall

(1) 5 M. & G. 81.

correct any mistake, and so on. Then comes the proviso which, as I read it, must be a proviso on the whole of the section. "Provided always, that . . . . no evidence shall be given of any other qualification than that which is described in the list . . . . nor shall the barrister be at liberty to change the description of the qualification as it appears in the list, except for the purpose of more clearly and accurately defining the same."

If that was a proviso on the whole section, then it follows that even with respect to mistakes made by the overseer in the description of the qualification the revising barrister could not correct them "except for the purpose of more clearly and accurately defining the same." But it appears to me that when we contrast that section with the language of the Act of 1878, the whole groundwork of the decision is gone, for sub-s. 13, so far from being a proviso to sub-s. 12, expressly excepts the whole section from its operation. And this additional observation may be made—nowhere in the Act of 1843 was such a provision as is made in s. 24 of the Act of 1878; and, when we find s. 24 providing for a cheap and easy method of correcting mistakes in the description of the qualification, then it follows that the power to correct must apply to such mistakes, and does not apply solely to cases which may be amended under sub-s. 12. As I read sub-s. 12 it has regard to the fact that, besides mistakes by the overseer, there may be other mistakes by the claimant in describing his qualification, as, for example, "workshop" whereas his qualification is a "warehouse," and the section provides for amendment although the mistake was made by the claimant, and was not a mistake of the overseer. For these reasons I think *Bartlett* v. *Gibbs* (1) does not apply to the sub-section we have now to deal with, and that the decision of the revising barrister was correct. I do not agree with his view that he was at liberty to strike out the numbers; his proper course would have been to insert "31, Prospect Place;" but, as the result would have been the same, viz., that he would have made an amendment that he was entitled to make, the mode he adopted does not interfere with our conclusion that the appeal should be dismissed and the list amended.

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(1) 5 M. & G. 81.

STEPHEN, J. I am of the same opinion.

LORD COLERIDGE, C.J. I have entertained and continue to entertain considerable doubts in this case. If the question were one which our decision necessarily concluded, and the decision of the Common Pleas, the jurisdiction of which is transferred to this Court, were clearly and distinctly wrong, it would, I think, be our duty to disregard that decision, and I should pronounce my own opinion on what I conceive to be the law. I have done that before, and believe it to be the correct course of a Court of ultimate appeal, following the course of other Courts of appeal, which Courts, believing an error to have been made, do not continue it, but correct the law. But where our decision is not conclusive, and in matters of registration, where it is far more important that the decisions should be all one way than *how* the matter should be decided, it appears to me better to adhere to former decisions, and I am unable to distinguish the case from that of *Bartlett* v. *Gibbs.* (1) In *Bartlett* v. *Gibbs* (1) it was laid down that when the true qualification was not one house but houses in succession occupied for the qualifying period, the description of those two must appear in the 4th column, where, not the "nature of the qualification," but the qualification itself is described. What is true of two houses is true of three or more, and if the decision in *Bartlett* v. *Gibbs* (1) is right, that when the qualification is two houses *both* must appear in the fourth column, it follows that in this case (and it was not seriously disputed), three houses must appear. That being so, and there being clearly a mistake in the description of the qualification, can that mistake be corrected? I admit that the opinion I have formed is one which I regret and dislike to form, because it is technical. The mistake was made, not by a voter but by the overseer, and no doubt, as is said in one of the cases, vigilantibus non dormientibus jura subveniunt: *Onions* v. *Bowdler* (2). Nevertheless it seems unreasonable that every voter in a large borough who may trust to the overseers finding out the succession of houses and giving him his vote, should have to go about and ascertain whether, according to the latest decision in

(1) 5 M. & G. 81.

(2) 5 C. B. 65.

the Registration Courts, the nature of his qualification is properly stated giving him the vote. But still there is this decision of a Court, not a Court of appeal, but, as my Brother Cave rightly said, composed of four judges of very high authority. In that case it does not appear that the mistake was a mistake of the overseer, but it must have been a mistake which the overseer passed, either intentionally or unintentionally. The Court decided that the mistake could not be corrected. The case was, no doubt, decided on 6 & 7 Vict. c. 18, but with a very slight exception (putting out of sight for a moment s. 24 of the Act of 1878), s. 28 of the Act of 1878 is identical to within a few words with s. 40 of the Act of 1843. The duty of the revising barrister is laid down in the very same words. The limitation of the duty is in identical words. But it is said—and I do not say there is not a great deal in the argument, although I am unable to see the force of it—that *Bartlett* v. *Gibbs* (1) does not apply, for two reasons:—First, because in the former statute, 6 & 7 Vict. c. 18, s. 40, the words are "provided always that . . . no evidence shall be given, &c.," whereas in 41 & 42 Vict. c. 26, s. 28, sub-s. 13, the words are "except as herein provided no evidence shall be given," &c. There may be more difference in that mode of enactment than appears to me. I have no doubt there is, having regard to the opinion of my Brother Cave. But it seems to me that both limitations occurring after the statement of actual duty, the limitation whether imposed by the phrase "provided always," or "except as herein provided," has the same effect, and means that the duty shall be absolute except in certain cases. Secondly, an argument is derived from s. 24, which does not occur in the Act of 1843 at all, and sub-s. 12 of the later Act, which also does not occur in the Act of 1843. But s. 24 and sub-s. 12 may still be limited to the subject with which they deal. Sub-s. 12 gives a convenient mode of correcting an entry of a matter which the revising barrister may think insufficient in law to constitute a qualification of the nature or description stated in the list, but sufficient in law to constitute a qualification of some other nature or description, and I think that s. 24 is limited to such cases. Being unable to see any substantial distinction between the sections in the present Act and those on which the Court of Common Pleas decided the case of *Bartlett* v. *Gibbs* (1), which is still law—and *if* it applies the revising barrister is wrong—for the reasons I have given I think that it does apply, and therefore the revising barrister was wrong, but as my learned Brothers are of a different opinion, I pronounce this judgment with great hesitation.

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(1) 5 M. & G. 81.

Appeal dismissed with costs. (2)

Bompas asked leave to appeal.

THE COURT gave leave. (3)

Solicitors for appellant: *J. E. Fox & Co.*
Solicitor for respondent: *J. Walker Friend.*

J. R.

1885
Feb. 24.

NIELSEN & CO. *v.* WAIT, JAMES & CO.

Ship—Demurrage—Charterparty—Lay Days—Usual Place of Discharge—Custom to lighten Vessel at Entrance to Port before proceeding to Place of Discharge.

By charterparty it was agreed that the plaintiffs' steamship should proceed to Cronstadt and load a cargo of wheat and therewith proceed to a port in the English or Bristol channel as ordered, "or so near thereto as she may safely get at all times of tide and always afloat, and deliver the same. Eight running days, Sundays excepted, to be allowed the merchants, if the ship be not sooner dispatched, for loading and discharging the steamer, and ten days on demurrage if required over and above the laying days at 25*l.* per day." The steamer arrived at Cronstadt, occupied six running days in loading a cargo of 4325 quarters of wheat, and was ordered to Gloucester, Bristol Channel, for discharge. She arrived at Sharpness Dock in the Bristol Channel on the 13th of November. Sharpness Dock is within the port of Gloucester, and about seventeen miles from the basin within the city of Gloucester where grain cargoes are usually discharged if the burthen of the ship will admit. The steamer was ready to commence the discharge of her cargo on the 13th, but could not get nearer to Gloucester than Sharpness until part of her cargo was first discharged at Sharpness. On the 14th and 15th of November the consignees discharged into lighters 1585 quarters of the cargo, and then required the master to take the steamer through the canal to a place of discharge within the basin at Gloucester. The master proceeded, and arrived in the basin on the 17th. On the 18th the residue of the cargo was discharged and the vessel returned to Sharpness, where she arrived on the 19th. In an action for demurrage evidence was given of a custom of the port of Gloucester, according to which the usual place of discharging grain cargoes was at the basin within the city, and when vessels with grain cargoes destined for Gloucester were of too heavy a burthen to come up the canal they were lightened at Sharpness, and during the discharge at Sharpness of so much of the cargo as it was necessary to discharge in order to enable the vessel to proceed by the canal to Gloucester Basin the lay days counted, but the time occupied by coming up the canal to discharge at Gloucester Basin and by returning to Sharpness was not counted :—

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(1) 5 M. & G. 81. (2) See last case.
(3) But no appeal was made.

Held, first, that the custom was reasonable, as the effect of it was not to detain the ship longer than if she had been wholly discharged at Sharpness; secondly, that it was not inconsistent with the express provision in the charterparty as to running days, for the proper inference from the facts was that the discharge of the vessel except for the purpose of lightening her did not commence until she arrived within Gloucester Basin. That, therefore, the time occupied by the vessel in going from Sharpness to the basin and in returning to Sharpness ought to be excluded from the lay days, and the plaintiffs were entitled to one day's demurrage only.

Caffarini v. *Walker* (Ir. Rep. 9 C. L. 431; Ir. Rep. 10 C. L. 250) and *McIntosh* v. *Sinclair* (Ir. Rep. 11 C. L. 456) considered.

ACTION to recover a balance of freight and demurrage.

At the trial before Pollock, B., at the Gloucester Summer Assizes, 1884, the jury, after evidence had been taken, were by consent discharged, and the case argued before the learned judge and afterwards by adjournment at the Royal Courts of Justice.

The facts are stated at length in the judgment of the Court.

R. Reid, Q.C., and *D. Brynmôr Jones*, for the plaintiffs, contended that the alleged usage as to lightening vessels at the entrance to the port of Gloucester was unreasonable, and was also inconsistent with the express terms of the charterparty. They cited *Caffarini* v. *Walker* (1) and *McIntosh* v. *Sinclair*. (2)

H. Matthews, Q.C., and *A. T. Lawrence*, for the defendants, cited *Brereton* v. *Chapman*. (3)

Cur. adv. vult.

Feb. 24. POLLOCK, B., delivered judgment as follows :—

The plaintiffs, as owners of the steamship *St. Hilda*, claimed against the defendants, as consignees of a grain cargo carried from Cronstadt to the port of Gloucester, a balance for freight and demurrage. In the result, however, the only question which remained between the parties was as to the number of lay days which were to be allowed to the defendants for discharging at the port of Gloucester. As to this the plaintiffs claimed four days' demurrage beyond the lay days. The defendants admitted only one day, in respect of which they tendered before action and paid into Court the amount claimed for that one day.

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(1) Ir. Rep. 9 C. L. 431; Ir. Rep. 10 C. L. 250.

(2) Ir. Rep. 11 C. L. 456.

(3) 7 Bing. 559.

The steamship *St. Hilda,* a vessel of 495 tons nett register, was by a charterparty made in London on the 7th of October, 1882, chartered by the plaintiffs to Messrs. Scaramanga & Co., a firm of London merchants. The charterparty provided that the steamer should proceed to Cronstadt, or so near thereto as she might safely get, and there load, always afloat, a full cargo of wheat or other grain, and therewith proceed to London, or to a good and safe port on the east coast of England, or in the English or Bristol Channel, or on the continent between Hamburg and Havre inclusive, or to Glasgow, or to a port on the east coast of Ireland, or to Limerick, as ordered on signing bill of lading, or at Elsinore or Falmouth, for ports west of Falmouth, "or so near thereto as she may safely get at all times of tide and always afloat, and deliver the same on being paid freight." The charterparty, after naming the freights payable at the different ports, continued as follows: "The freight to be paid on unloading and right delivery of the cargo in cash; eight running days, Sundays excepted, are to be allowed the said merchants—if the ship be not sooner dispatched—for loading and discharging the said steamer, and ten days on demurrage if required over and above the said laying days at 25*l.* sterling per day. If not ordered on signing bill of lading steamer to proceed to Elsinore, and if no orders there within twelve hours of arrival, lay-days to count until ordered to port of discharge or to Falmouth for final orders as above, which are to be given within twelve hours of arrival or lay days to count, but if she calls at Falmouth 10*l.* to be paid for doing so. . . ."

In accordance with this charterparty, the *St. Hilda* proceeded to Cronstadt, and there loaded a cargo of 4325 quarters of wheat in bulk. A bill of lading in respect of this cargo was signed by the master and delivered to Scaramanga & Co., which provided for the delivery of the cargo to them or their assigns "on paying freight for the said goods and all other conditions per charterparty." There was indorsed on the charterparty "six running days, Sundays excepted, expended in loading the cargo," and further: "Captain Robinson is hereby directed to proceed with steamship *St. Hilda* and her present cargo to Gloucester, Bristol Channel, for discharge." The steamer arrived at Sharpness Dock in the Bristol Channel at 11 o'clock A.M. on the 13th of November, 1882. Sharpness Dock is within the port of Gloucester and about seventeen miles from the Basin, which is within the city of Gloucester, where grain cargoes are usually discharged if the burthen of the ship will admit, the access from Sharpness Dock to the City Basin being attained by the Berkeley ship canal.

On the 13th November, 1882, the steamer was cleared at the custom house and lay at Sharpness ready to commence the discharge and delivery of the cargo to the defendants, who were the holders of the bill of lading, but she could not get nearer to Gloucester than Sharpness unless a considerable portion of her cargo was first discharged at Sharpness. The defendants on the 14th and 15th of November discharged and took delivery into lighters of 1585 quarters, and then required the master to take the steamer through the canal to a discharging berth within the basin at Gloucester, and adjoining the defendants' warehouse. On the 16th the captain proceeded under protest for the basin and arrived on the 17th. On the 18th the residue of the cargo, 2740 quarters, was discharged by the defendants, and on the same day she commenced her return to Sharpness, where she arrived on the afternoon of the 19th of November. The plaintiffs claimed to reckon six days for detention at the port of discharge, making two lay days and four on demurrage, and for this they claimed to be allowed not only for the two days occupied in unloading at Sharpness and the one day unloading at Gloucester Basin, but also for the two days occupied in proceeding from Sharpness to the Basin, and the one day occupied in returning. The defendants, on the other hand, contended that the two days occupied in going from Sharpness to the Basin and the one day occupied in returning ought to be excluded, and they allowed only for the two days occupied in discharging at Sharpness and the one day at Gloucester Basin, which, with the six days occupied by the loading at Cronstadt, would leave only one day on demurrage, for which they had paid the amount claimed into court.

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The case came on for trial at the last Summer Assizes at Gloucester before myself and a special jury, when the above facts were admitted, and no evidence was called on behalf of the plaintiffs. Two witnesses, corn merchants of long experience at Gloucester, were called on behalf of the defendants to prove the custom of the port of Gloucester with respect to the delivery of grain cargoes out of ships of too large a burthen to come up the canal without some portion of their cargo being discharged at the entrance. The custom as stated by them was as follows:—That the customary place for discharging grain cargoes has always been at the Basin within the city, and that they had never known a vessel refuse to go there. That when vessels with grain cargoes destined for Gloucester were of too heavy a burthen to come up the canal they were lightened at Sharpness; that during the discharge at Sharpness of so much of the cargo as it was necessary to discharge in order to enable the vessel to proceed by the canal to Gloucester Basin the lay-days counted, but that the time occupied by coming up the canal to discharge at Gloucester Basin and by returning to Sharpness was not counted. They cited individual cases in which the question had arisen between a shipowner and the consignee, and in which after some dispute the shipowner had given way and accepted an amount of demurrage based on this custom. This evidence was not disputed by the plaintiffs' counsel, but the witnesses in question were cross-examined; and, as is usual in such cases where evidence of a custom is given by laymen, they made some statements whence it might be argued that the custom went too far. In my judgment these answers indicated nothing which detracted from the custom as proved by the witnesses, but only shewed what was their opinion with regard to the result of the custom. One of the witnesses also stated on cross-examination that during the last ten years docks and warehouses had been built at Sharpness into which merchants occasionally had grain cargoes discharged. This, however, would have no application to the present case, as it has never been proved or suggested that the portion of the cargo discharged at Sharpness was placed or intended to be placed in any warehouses or even upon the dock side. I therefore considered that the custom in substance as proved by them was established in fact. Towards the close of the case it was agreed that the matter should be withdrawn from the jury, and that I should deal with the evidence with power to draw inferences of fact.

Under these circumstances, the question that arises between the parties is a mixed one of law and fact, or rather it is a question what is the proper conclusion to be drawn from the facts given in evidence when governed by the law as far as any exists which is applicable to the subject. The duty of the Court in weighing this evidence is, I apprehend, first to consider what is the contract between the parties as created by the charterparty and bill of lading; and next, to what extent is that contract controlled by the custom which is said to govern the reckoning of the lay days at the port of discharge; and, lastly, to consider whether the custom is reasonable, and how far, in accordance with law and mercantile usage, the contract and the custom can be reconciled.

On behalf of the shipowner it is clear that, custom or no custom, his interests are protected by the charterparty to this extent, that his vessel is never to be placed in any position to which she may not safely get at all times of tide and always afloat; and, as was said by Rolfe, B., in *Shield* v. *Wilkins* (1), the word "safely" means safely as a loaded vessel; and, therefore, under any circumstances the plaintiffs would have been entitled to insist that their vessel should not be ordered to discharge at any place which would be inconsistent with their rights in this respect; but it by no means follows that these rights may not be subject to the right of a consignee to require the ship to go further on to a usual place of discharge in the port to which she is consigned, if he is willing at his expense to lighten her by receiving a portion of the cargo short of that usual place of discharge. It is said in Abbott on Shipping, 12th ed., p. 324, that "the manner of delivering the goods, and consequently the period at which the responsibility of the masters and owners will cease, depend upon the custom of particular places and the usage of particular trades;" also (p. 243), "the lay days are to be reckoned from the time of the ship's arrival at the usual place of discharge and not from her arrival at the port, although, for the purposes of navigation, some of her cargo might be discharged at the entrance," and it is almost unnecessary to state that in many ports where the entrance is shallow, or there is a bar at the mouth of the port, it has been the common course to discharge so much of the cargo into lighters outside the bar as will enable the vessel to go over the bar and discharge the residue of her cargo at the accustomed place of discharge higher up in the port. This practice is clearly recognised in the case of *Brereton* v. *Chapman* (1), where a vessel was chartered from Hamburg to Wells, or so near there as she could safely get, and it was held that the lay days were to be reckoned from the time of the ship's arrival at the usual place of discharge, and not at the port merely, although it was necessary for her to discharge some of her cargo at the entrance of the port before she could go higher up.

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(1) 5 Ex. 305.

The law and practice in such cases is very clearly stated by the late L.J. Lush, in *Capper* v. *Wallace* (2), where he says: "It cannot, we think, be laid down as an inflexible rule that when a ship has got as near to the port as she can get, and the only impediment to proceeding further is overdraught, the master is under all circumstances entitled to consider the voyage at an end. He is bound to use all reasonable means to reach the port. The words 'as near thereto as she can safely get' must receive a reasonable and not a literal application. The overdraught may be such, and the cargo so easily dealt with, as that the surplus may be removed and the ship sufficiently lightened without exposing her to extra risk or the owner to any prejudice, and without substantially breaking the continuity of the voyage, and in such a case if the consignee is at hand to receive the surplus cargo and so relieve the overdraught, we are of opinion that it would be the duty of the master to lighten the ship and proceed to the port." He cites also with approval the Scotch case of *Hillstrom* v. *Gibson*, decided in 1870. (3) In this case a vessel was chartered abroad to take a cargo to "a safe port" in the United Kingdom, "or so near thereto as she can safely get, and lay afloat at all times of the tide, and deliver the same, and so end the voyage." After the words "deliver the same," the words

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(1) 7 Bing. 559.

(2) 5 Q. B. D. 166.

(3) Scotch Sess. Cas., 3rd Series, vol. viii., p. 463.

"according to the custom of the port" in the printed form of the charterparty were struck out before signature. The vessel was ordered to Glasgow, but on her arrival at the "Tail of the Bank," which is an open roadstead near Greenock, twenty-two miles from Glasgow, it was found that unless she was lightened she could not lie afloat in Glasgow harbour at low tide. In these circumstances the shippers, according to custom, lightened the vessel by taking delivery of a part of the cargo, and then required the master to deliver the remainder at Glasgow, which he did under protest, and raised an action for demurrage. It was held that demurrage was not due, Glasgow being the port of discharge, and the ship having been lightened merely to enable her to complete her contract by delivery of the cargo there.

Assuming the above to be correct and to be properly applicable to a case like the present, it does not, in my judgment, affect the question whether the position of the place where the lightening of the vessel usually takes place is without or within the ambit of the particular port. The point to bear in mind is, What was the substantial character of the act? Was it a part discharge in the ordinary acceptation of those words, or was it a discharge made solely with the view of lightening the ship?

On the other hand, it is equally clear as a general rule, and apart from the custom of any particular port, that when once a ship has arrived at the place within the port of discharge where such vessels are usually discharged and is ready to discharge her cargo, she is an arrived vessel, and although the consignee may be entitled to order her for the purpose of discharge to different places within the same port, the lay days commence when she is ready to discharge at the first place to which she is ordered, and continue without intermission until her discharge is completed.

The broad question, therefore, raised between the plaintiffs and the defendants seems to be this. In estimating the lay days ought the partial discharge at Sharpness to be considered as a discharge short of the ship's destination for the purpose of lightening her so as to enable her to reach the place of destination, in which case she would not be an arrived ship until she came within the Basin at Gloucester, or should Sharpness be considered merely as one of two or more places within the port of Gloucester, at which the consignee might require the cargo wholly or in part to be discharged. If the first of these two contentions be correct, the defendants are entitled to succeed. If the latter, the plaintiff is entitled to count the lay-days from the time when the *St. Hilda* was ready to commence discharging at Sharpness. Whichever side may be in the right, the question is by no means free from difficulties, and involves a careful consideration of many arguments pro and con and of the results to which they lead.

Before I deal with the alleged custom, it is well to look from a practical or commercial point of view at what was the object and result of the partial discharge at Sharpness. It has never been contended that it was done for the benefit of the defendants, or because they required it for transshipment or any other purpose at Sharpness. The discharge was effected by placing a portion of the cargo into lighters provided by and at the expense of the defendants. Their only warehouse adjoined the Basin at Gloucester, and before they could deal with that portion of the cargo they would have to take it thither in the lighters at their own cost and risk.

Again, before dealing with the custom and its effect, it seems necessary to inquire what was the condition of things before the canal was made, and before, therefore, any such custom in the precise terms in which it is now alleged could have existed. At that time ships trading to Gloucester must have been sailing vessels, and probably were of much smaller burden than now. The particular clause, "so near thereto as she may safely get and always afloat" had not, as far as I am aware, been introduced into charterparties. What would have taken place would, however, have been as follows: vessels laden with grain for Gloucester would, if their draught would admit of it, have gone up the River Severn to Gloucester Basin. If they could under no circumstance proceed so high up the river as the Basin they would deliver into lighters provided by the consignee so near to the Basin as the vessel could safely get; and to put a third case, more like the present, in which the vessel could reach the Basin after being lightened by a portion of her cargo, it is reasonable to assume that she would discharge so much as would be necessary at a point below Gloucester and then proceed with the residue of her cargo and discharge at the Basin.

When once the canal was completed it is necessary only to look at the map to see how great a gain was attained by both ship and cargo owner; the old passage to the Basin in Gloucester by the River Severn being twenty-eight miles by a tortuous stream and the canal only eighteen miles of direct and easy navigation. This was effected some fifty years ago, and although no evidence was given as to what was done so far back, it is reasonable to suppose that an arrangement similar to that which is now stated to be the custom would be adopted for the mutual benefit of the ship and cargo owners, and it is one which, if adopted and continued for many years, might well be upheld as a valid usage upon such evidence as was given before me. In considering whether it is a usage of sufficient certainty and sound reason to be upheld in a Court of law one of the matters to be considered is the proportion of the cargo which it would be necessary to unload at Sharpness. In the present case this was somewhat more than a third, but if there be no objection to the usage in other respects this proportion, having reference to the object of the voyage and the mutual convenience of the shipowners and the consignees, does not appear to me to be so great as to shew that a usage which entitles the shipowner to insist upon it is unreasonable.

In considering whether the custom is reasonable or otherwise, it must also be remembered that it does not detain the ship longer than if she were wholly discharged at Sharpness. The unloading at the quay in Gloucester Basin being more rapid than the discharging into lighters at Sharpness, compensates for the time occupied in going up and down the canal; so that, if the loading and unloading can be accomplished within the lay-days, there is no loss to the ship whether the cargo is wholly discharged at Sharpness, or one-third is discharged at Sharpness and two-thirds at Gloucester.

It was argued for the plaintiffs that such a usage was inconsistent with the express provisions of the charterparty, first generally, and secondly, because to give effect to it would destroy the force of the words "running days." As to the first of these arguments, having explained the history and object of the usage, I think I need say no more than that in my judgment it is one that does not repeal or annul any part of the charter. It may well be imported into and co-exist with it.

The second and more specific objection is certainly worthy of careful consideration. The words "running days" were introduced into charterparties to prevent the shipowner being liable for delay occasioned by his vessel being moved for the convenience of the consignee to different places of discharge within the same port, and, as I have already said, if the two discharges at Sharpness and Gloucester Basin are to be considered for all the purposes of this case as merely two places of discharge within the port of Gloucester, the defendants would be out of court. If, however, the true view be that the partial discharge at Sharpness is solely for the purpose of lightening the ship so as to enable her to proceed to the usual and proper place of discharge, then the case is very different. The custom might have been that the lay days were not to commence until the vessel arrived at Gloucester Basin, just as in *Brereton* v. *Chapman* (1), where by the custom of the port of Wells, the lay days did not begin until the ship arrived at the usual place of discharge, although some of her cargo was discharged at the entrance of the port, in which case there would be no break in the continuity of the running days. This, however, is not claimed by the defendants. What they do claim is, that notwithstanding the use of the words "running days" effect shall be given to the custom, and that the days occupied in going up and down the canal shall not be reckoned, and if the proper inference to be drawn from all the facts in the case is that the discharge of the vessel, except for the purposes of lightening her, did not commence until she arrived within Gloucester Basin, or in other words, that she was not till then an "arrived vessel," I see no difficulty in so excluding the days occupied in the canal, although by the custom the days occupied in the partial unloading at Sharpness are conceded to the shipowner.

The conclusions therefore I come to are: that the custom is proved in fact; that it is not unreasonable; that it is not so inconsistent with the contract contained in the charterparty as to make

(1) 7 Bing. 559.

it necessary to reject it, but that it can well co-exist with the contract; and lastly, that it is binding upon both plaintiffs and defendants.

Before coming to this conclusion I have carefully considered the two Irish cases of *Caffarini* v. *Walker* (1) and *M'Intosh* v. *Sinclair* (2) cited for the plaintiffs. Both of these cases arose out of claims for demurrage made by shipowners in respect of vessels ordered to the port of Newry. In the first, which came before both the Court of Queen's Bench and the Exchequer Chamber, the charterparty provided that "fifteen running lay-days shall be allowed for loading and discharging the vessel, commencing from the time the captain gives written notice to the charterers that he is ready to receive and discharge cargo; forty-eight hours to be allowed at port of call, all over to count as lay-days, and for each and every day's detention by default of said party of the second part (the charterer) demurrage at the rate of 10*l.* per day shall be paid day by day by the said party of the second part, vessel to be ordered to one safe port only, where she can safely proceed, load and discharge always afloat." By the bill of lading she was ordered to the "port of Newry." From the weight of the cargo, the depth of water, and the draught of the vessel, it was necessary to discharge part of her cargo at "the Pool" in Carlingford Roads, about ten miles from Newry, then to proceed to the Victoria Lock of the Newry Canal and there discharge another portion of her cargo, to enable her to go through the canal to the "Albert Basin," an artificial basin at Newry, and the usual place of discharge, where she completed the discharge of her cargo. It was held that "the Pool" being within the "port of Newry" for custom-house purposes, and taking the "port of Newry" in its legal sense and not as a geographical expression, the lay days began to run from the date of the commencement of the discharge at "the Pool." Although this decision is not binding upon me, I need not say that I should hesitate long before I differed from it, but I do not differ. The result arrived at after a very careful exposition of the law by the learned judges in both Courts appears to me to be correct, but the case is not in point as governing the present. In

(1) Ir. Rep. 9 C. L. 431; Ir. Rep. 10 C. L. 250. (2) Ir. Rep. 11 C. L. 456.

Caffarini v. *Walker* (1), the language of the charterparty whereby the lay days are governed is not the same as in the present case, and although it was proved that "the Pool," was in the "port of Newry," and also that the Albert Basin was "a proper place for discharging cargo deliverable in the port of Newry," no custom as to the reckoning of lay days such as has been proved in the present case was attempted to be set up, and the ground of the decision may be shortly stated in the language of Morris, C.J., when delivering the judgment of the Exchequer Chamber. He says: "The plaintiff in this case arrived at 'the Pool,' the proper place to commence discharging, and indeed the only possible place for a vessel of the burthen of the plaintiff's. The defendant accepted the discharge to the extent necessary to enable the ship to proceed to the next point of discharge—the Lock—and there again accepted discharge sufficient to enable the ship to proceed to the Albert Basin, the final point of discharge. I should arrive at the conclusion that all the three places constituted the usual place of discharge for ships of the size of the plaintiff's."

The case of *M'Intosh* v. *Sinclair* (2) is nearly similar to that of *Caffarini* v. *Walker* (1), and does not carry the plaintiffs' point any further. There again no evidence was tendered of a usage such as was proved in the present case, and the words of the charter were more favourable to the plaintiffs, being as follows: "It is agreed that the lay days for loading and discharging shall be as follows, commencing from the time the vessel is ready to be receive or discharge cargo." Palles, C.B., in giving judgment says as follows: "In my judgment, the nature of the act is to be determined by the jury having regard to the terms of the contract and usage of the port. All I determine is that, where, as in the present case, the place at which the removal of cargo takes place is 'within the ambit of the port': *Schilizzi* v. *Derry* (3); when that removal is not exceptional or unusual, but so common as to be the foundation of a binding usage in the port, when the portion which according to the usage is removed is not small or inconsiderable, but as much as two-thirds of the entire, the jury may, notwithstanding evidence of an attempt by the merchants to establish an inconsistent usage as to lay days, hold that the operation is in substance a part-discharge, and the place where that operation is usual, a usual place for the commencement of the discharge."

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(1) Ir. Rep. 9 C. L. 431; Ir. Rep. 10 C. L. 250.

(2) Ir. Rep. 11 C. L. 456.

(3) 4 E. & B. 886.

There will be a verdict and judgment for the defendants.

Solicitors for plaintiff: *Turnbull, Tilly, & Mousir.*

Solicitors for defendants: *E. Doyle & Sons.*

A. P. S.

Feb. 24.

THE COMPANY OF PROPRIETORS OF THE WEST MIDDLESEX WATERWORKS, APPELLANTS; JACOB COLEMAN, RESPONDENT.

JACOB COLEMAN, APPELLANT; THE COMPANY OF PROPRIETORS OF THE WEST MIDDLESEX WATERWORKS, RESPONDENTS.

Water-rate, Assessment of—Domestic Purposes, Supply for—Annual Value—Premises used as Public-house—Licence—Premium.

By the special Act of a water company it was provided that water should be supplied for domestic purposes by the company at a rate per cent. upon the annual value of the dwelling-house or other place supplied, that a supply of water for domestic purposes should not include a supply of water for, among other things, any trade or manufacture or business requiring an extra supply of water, and that the company might furnish water for other than domestic purposes on such terms as might be agreed on between the company and the consumer.

The company supplied water for domestic purposes to a house occupied as a licensed public-house. The company contended that the annual value of the premises as a licensed public-house should be taken as the basis of the water-rate payable in respect of such supply, and that therefore the fact of the premises being licensed, and a premium which had been paid for the lease of the premises as a public-house ought to be taken into consideration in fixing the value. The occupier contended that such water-rate should be based upon the value of the premises for domestic purposes only:—

Held, that the contention of the company was correct.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, the substance of which was as follows:—

The said Jacob Coleman was the occupier of the Carlton Bridge Tavern public-house, 45, Woodfield Road, Westbourne Park, in the parish of Paddington, in the county of Middlesex, and within the metropolitan police district, and he was supplied with water by the said company. A dispute having arisen between them as to the annual value of that house, the parties appeared before the magistrate on the 12th of June last in order that he might determine the said dispute under 10 Vict. c. 17, s. 68. He adjourned the case for consideration, and on the 1st of August determined the case by fixing the annual value at 122*l.* 10*s.*, and, both parties being dissatisfied with his decision, he stated the case at the request of both of them. The company had recently raised the water-rate, contending that it should be assessed on an annual value of the premises of 165*l.* per annum. Coleman, the tenant, contended that the rate should be assessed as it had previously been on an annual value of 70*l.* per annum.

On the hearing of the summons the following facts were either proved or admitted by both parties:

The premises consisted of a dwelling-house at the corner of the road in which Coleman carried on the business of an ordinary public-house. There were no rooms for the accommodation of the public, but the whole of the trade done by him consisted in selling spirits, wine, and beer across the bar to any person who came and applied for the same. The trade was wholly carried on on the ground floor and was described by Coleman himself as purely a bar trade. Coleman held the ordinary magistrates' licence granted to him under the Licensing Act, 1872, and other licensing Acts, and the excise licence granted in pursuance thereof. He lived on the premises with his wife and children, and the water was supplied to him for domestic purposes. He paid besides an extra charge of 15*s.* for trade purposes.

Coleman held the premises under a lease which was granted in 1880 in consideration of the sum of 7500*l.* paid by the lessee (Coleman) to the lessor (one Marsh), and also in consideration of the rents and covenants contained therein, the rent reserved for the house and premises being 122*l.* 10*s.* per annum. The lease contained the usual covenants on the part of the lessee to do all the repairs, to pay the insurance, to pay the rent, to keep up the licences, and solely to use the premises as a public-house. The lessor covenanted not to carry on the trade of a licensed victualler within one-third of a mile of the said premises without returning and paying the sum of 500*l.* as liquidated damages.

In addition Coleman, on entering the premises, paid the lessor the value of the trade-fittings, and also had paid 35*l.* per annum for his licence under 43 & 44 Vict. c. 20, s. 43.

It was further proved before the magistrate that the gross rental of other houses of a similar description in the neighbourhood let as dwelling-houses was 50*l.* per annum, or 60*l.* if let as shops; that the sum of 7500*l.* and rent agreed to be paid by the lessee had been calculated on what the lessor, who was the former occupier carrying on the trade of a publican there, had been able to make in such house.

For poor-rate and other rateable purposes the net annual value was inserted in the valuation list of the parish made in 1881 at 168*l.*, but both parties agreed that the magistrate was in no way bound by the value appearing in the said list.

The counsel for the company contended that, as a bargain had been made between the landlord and tenant so recently as 1880, the best evidence of the annual value was the fact that Coleman had agreed to pay for the right to occupy the premises and for the benefit he was likely to derive from their occupation by carrying on the trade of a publican 7500*l.* down, and an annual sum of 122*l.* 10*s.*, and that the annual value ought to be arrived at by taking the rent actually paid, and also by taking into account the sum of 7500*l.*; that that amount paid to the landlord was a material element for the magistrate's consideration, although not an absolute test for determining the value of the premises; and that the tenant could afford to pay to the landlord a rent of 497*l.* 10*s.*, being the rent of 122*l.* 10*s.* plus 375*l.*, or 5 per cent. on 7500*l.*, in all 497*l.* 10*s.*, which he contended was the yearly worth, or annual valuation, of Coleman's occupation.

The company also contended that, as the trade carried on in the public-house was the ordinary bar trade from the passers by and from the inhabitants in the immediate locality, the sum of 7500*l.* could not be treated as paid solely for goodwill or profits of the business.

The counsel for Coleman contended that the sum of 7500*l.* was paid for goodwill and profits alone; that the magistrate ought to disregard the additional value given to the house by reason of its being fitted up as a public-house, or by reason of the house being a licensed public-house; that he should determine the value by taking the gross rental of other houses of the same description in the neighbourhood, in which case the net annual value would be no more than 70*l.* per annum.

The magistrate stated that, after taking into consideration the annual value of house property used as dwellings and shops of the same description as Coleman's in the immediate neighbourhood, the situation, and the fact of the house having a licence as a public-house, and after making reasonable and fair deductions, he assessed the annual value at 122*l.* 10*s.*; that it appeared to him that the rent agreed to be paid by Coleman annually was a substantial rent for the premises, and a fair value for the house for domestic purposes upon which the water-rate would be assessed; and that the 7500*l.* was in fact paid for goodwill, and calculated upon past and supposed accruing profits, and as such should not under 15 & 16 Vict. c. clix. (the company's special Act), s. 39, be taken into consideration in determining the annual value of the premises. He was of opinion that he had a right, in determining the annual value, to take into consideration the licence attached to the premises. The questions for the opinion of the Court were:—1st. Whether the magistrate was right in the mode of determining the annual value of the premises, in excluding any consideration of the sum of 7500*l.*, and in including the increased value of the same by reason of a licence being attached to them? 2nd. Whether he was right in his decision of the case?

The 15 & 16 Vict. c. clix. (the company's special Act), s. 39, in substance provides that the company shall at the request of the owner or occupier of any house in any street within the limits of the Act in which any pipe of the company shall be laid furnish to such owner or occupier a sufficient supply of water for domestic purposes at the rates thereinafter specified; that is to say, where the annual value of the dwelling-house or other place supplied shall not exceed 200*l.* at a rate per cent. per annum on such value not exceeding 4*l.*, and where such annual value shall exceed 200*l.* at a rate per cent per annum on such value not exceeding 3*l.*

The 42nd section of the Act provides that a supply of water for domestic purposes shall not include a supply of water for steam engines or railway purposes, or for warming or ventilating purposes, or for working any machine or apparatus, or for baths, horses, cattle, or for washing carriages, or for gardens, fountains, or ornamental purposes, or for flushing sewers or drains, or for any trade or manufacture or business requiring an extra supply of water.

The 44th section provides that the company may supply water within their district for other than domestic purposes at such rates and upon such terms and conditions as shall be agreed upon between the company and the person or body desirous of having the supply.

Sir F. Herschell, S.G. (*Poland*, with him), for the company. By the 39th section of the special Act, where water is supplied for domestic purposes, the rate is to be assessed upon "the annual value of the dwelling-house or other place." "Annual value" must mean the annual value of the whole premises whatever they may actually be. There is nothing in the Act to limit the value to the value of the premises as a dwelling-house. The premises must be valued at the value they bring to the owner, after making the necessary deductions, as they stand, and for the purposes for which they are occupied. This house being a public-house with a licence must be valued as such: *Dobbs* v. *Grand Junction Waterworks Co.* (1) The magistrate was therefore clearly right in taking the licence into consideration. He was wrong in excluding the premium of 7500*l.* from his consideration. He says that it appeared to him to have been paid for goodwill, and he seems to assume that no part of it covered value of the premises. So far as it might represent capitalised annual value of the premises, whether as a public-house or otherwise, it ought to have been taken into account in fixing the value. [He cited *Rex* v. *Bradford* (2); *Allison* v. *Overseers of Monkwearmouth Shore.* (3)]

Webster, Q.C. (*Sutton*, with him), for the occupier. The contention for the person rated is that the annual value referred to

(1) 9 App. Cas. 49.
(2) 4 M. & S. 317.
(3) 4 E. & B. 13; 23 L. J. (M.C.) 177.

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by the 39th section is the annual value for domestic purposes. By the 42nd section water supplied for business purposes is not included in the supply for domestic purposes, but is charged for independently. Therefore, in estimating the value of the premises in order to fix the water-rate for domestic purposes, value for other than domestic purposes, which would have to be taken into consideration in estimating the special charges under s. 42, ought to be excluded, or otherwise the company will be paid twice over. Here the occupier pays a special charge for water for business purposes under s. 42. It may be that, if necessary, it might be successfully contended that parts of premises occupied exclusively for non-domestic purposes ought not to be included in the valuation, and that, if part of the premises only is supplied for domestic purposes, that part only ought to be rated; but, for the purposes of the present case, admitting that the whole of the premises is to be valued, the contention is that in arriving at their value the value for domestic purposes only is to be considered. The poor-rate cases are not applicable. In the case of the poor-rate it may be that the value of the premises as applicable and applied to the purposes of a particular business, such as that of a publican, must be considered, but here it is contended that the value for domestic purposes only must be considered. The magistrate was right in excluding the premium from consideration, because that premium was clearly paid only for goodwill, or for the value of the premises as applied to the particular business of a public-house, and does not cover capitalised rent or annual value for domestic purposes. The statements in the case with regard to the value of similar premises used for domestic purposes only prove this to be the case. The same reasoning applies to the licence. The licence does not enhance the value of the structure, it represents no element in the annual value of the premises themselves. At the most it only increases the value of the occupation for the purposes of a particular business. If the contention be correct that the value for domestic purposes only is to be considered, it is clear that the magistrate was wrong in taking the licence into consideration.

[LORD COLERIDGE, C.J. It may be that the result of the construction contended for would be very reasonable, but I do not quite see how it is to be got out of the words of s. 39. The section does not say that the supply for domestic purposes is to be charged for according to the annual value for domestic purposes, but according to the annual value.]

[He cited *Overseers of Sunderland* v. *Sunderland Union.* (1)]

Poland, in reply. There is no difference between the poor-rate and the water-rate so far as the principle of valuation is concerned. In each case the annual value of the premises has to be arrived at, and for that purpose they must be considered as they are. The house being a public-house with a licence and certain advantages of situation for the purposes of a public-house, the annual value is the rent which the owner can get for it as such, subject to certain deductions necessary to maintain the value of the premises. The licence was rightly taken into consideration as enhancing the annual value. A public-house is not like an ordinary shop, as the business can only be carried on upon licensed premises, so that competition is restricted. The premium clearly included capitalized rent. The contention on the other side, admitting that the whole of the premises is to be valued, seeks to value them, not as what they are, but as what they are not. The words of the Act afford no basis for that contention. The 42nd section does not apply only to water required for trade purposes, but to water required for baths and warming and ventilating purposes.

Where premises are used for trade purposes, the water is used for domestic purposes by persons who come there for trade purposes: as, for instance, by the employés at a large place of business. The water is none the less used for domestic purposes, because its use is incidental to the use of the house for trade purposes.

A similar question has arisen in regard to inhabited house duty. In that case however the legislature has made special provision, see 14 & 15 Vict. c. 36, schedule, whereas here there is no such provision.

[He cited *Reg.* v. *London and North Western Ry. Co.* (2); *Reg.* v. *Verrall.* (3)]

(1) 18 C. B. (N.S.) 531.
(2) Law Rep. 9 Q. B. 134.
(3) 1 Q. B. D. 9.

Lord Coleridge, C.J. In determining this case we have not to say what the annual value of the occupation of these premises may be, that being a matter of fact for the magistrate to decide. We have to determine whether the mode of valuation adopted by the magistrate was correct. These cases are no doubt somewhat difficult, but, after giving the case the best consideration I can, I come to the conclusion that the magistrate was not altogether right in the mode of arriving at the value which he adopted. It seems to me that he was wrong in excluding altogether from his consideration the sum of 7500*l.* paid down as a premium on the granting of the lease. He says that it appeared to him that that was paid for the goodwill. If I thought that he had really found as a fact that it was paid only for the goodwill of the business, I should perhaps have hesitated before interfering with his decision in this respect, but I cannot help thinking, upon the case as stated, that the point he means to submit to us is whether, as a matter of law, he was bound to exclude that amount from his consideration in arriving at the annual value. In my opinion, he must consider what in fact the annual value of the premises is, and, in arriving at that value, he must consider how much of such premium represents capitalized rent of the premises. Take the case of a house used merely as an ordinary dwelling-house, and for no other purpose. If the consideration paid for the occupation consisted partly of premium and partly of rent, such rent being reduced by reason of the payment of the premium, it is plain to my mind that the value of such occupation must be determined by consideration of all the circumstances, and, among others, of the fact that a premium was paid. Therefore I think that the magistrate was wrong in altogether excluding the payment of 7500*l.* from his consideration. What effect he should give to it, how he is to split it up, and to what extent his determination of the value may be thereby modified; these are questions which, as it seems to me, it is not for us to decide. What we decide is that he is to take the premium into account as an element in determining the value.

I think that the magistrate was right in taking the licence into consideration as an element in determining the annual value of the premises. According to the decision of the House of Lords the annual value for this purpose means the annual value to the owner, after the deduction of certain expenses necessary to maintain the value of the premises. It appears to me that the fact of this house being a licensed house is an element of its value which makes the occupier able and willing to give more rent. Mr. Webster abstained from pressing in the present case the contention that the water-rate ought to be assessed upon the annual value only of so much of the premises as is occupied as a dwelling-house, a contention which, if pressed, might perhaps where it is applicable, raise a question worthy of consideration.

It being admitted, however, that the whole of the premises is to be valued, I see no reason logically why we should exclude a particular element of value such as the licence forms in this case. I think that the magistrate was wrong in altogether excluding the premium from consideration, and right in taking the licence into consideration. The case must therefore be remitted to him to give effect to our decision.

SMITH, J. The question here raised is how the annual value of these premises is to be estimated for the purposes of the water-rate. Both sides agree that the judgment in *Dobbs* v. *Grand Junction Waterworks Co.* (1) has decided that for this purpose annual value means the net value of the premises to the owner after all proper deductions. But the company on the one hand contends that the annual value of the premises must be ascertained, as they stand and occupied as they are; the party to be charged, on the other hand, contends that the only value to be taken into consideration is the annual value of the premises as they stand if occupied for domestic purposes only. Mr. Webster insists that the terms of the 39th section of the Act limit the value upon which the water-rate is to be assessed to the value for domestic purposes excluding trade purposes. Mr. Poland, on the other hand, referred to the Acts relating to inhabited house duty as shewing that, where such a limitation of the value was intended, express provision is made, and contended that this Act neither in express terms, nor by necessary implication, makes any such provision. I think that the contention of the company is

(1) 9 App. Cas. 49.

correct. Sect. 39 in effect says that the owner or occupier of a dwelling-house, when he requires a supply of water for domestic purposes, shall have it at a rate calculated upon the annual value of the house. Therefore, when once the annual value of the premises is ascertained, then, no matter how and for what purpose they are occupied, the payment for a supply of water for domestic purposes must be according to such value. It seems to me that "annual value" means annual value of the house as it stands and as it is occupied, viz., as a public-house with a licence. I therefore think that the magistrate was right in taking the fact that it was a licensed house into consideration in estimating the value. But he has excluded altogether from his consideration the premium paid when the present tenant entered on his occupation. He says that it appeared to him that that was paid solely for goodwill. It is conceded that, if this had been the case of an ordinary dwelling-house, the premium must have been taken into consideration as including capitalized rent. Mr. Webster says that in this case it is not to be taken into consideration, because it was a premium which was paid only in respect of the trade purposes for which the premises were occupied. It seems to me that, this being a licensed house, and, as we have already decided, to be valued according to its value enhanced by that circumstance, it is impossible to say that the premium paid upon coming into and occupying such licensed house so enhanced in value should be altogether excluded from consideration in arriving at the value. I think, therefore, that the magistrate should have taken it into consideration. How and to what extent that may ultimately affect the valuation I do not think it is our province to say.

Case remitted.

Solicitors for occupier: *Peckham, Maitland, & Peckham.*
Solicitors for company: *Baileys, Shaw, & Gillett.*

E. L.

[IN THE COURT OF APPEAL.]

1884
Aug. 12.

TOMLINSON *v.* THE LAND AND FINANCE CORPORATION, LIMITED.

Practice—Security for Costs—Interpleader by Sheriff—Defendant in Issue liable to give Security for Costs.

In an interpleader issue directed upon an application by a sheriff, who has received a notice of a claim to goods seized by him under a writ of fieri facias in execution of a judgment, both the plaintiff and the defendant in the issue are really in the position of the plaintiffs in an ordinary action, and, therefore, the defendant in the interpleader issue may be ordered to give security for costs in any case in which a plaintiff may be so ordered, and the rule, that a defendant cannot be compelled to give security for costs, does not apply.

Williams v. *Crosling* (3 C. B. 957) followed.

Belmonte v. *Aynard* (4 C. P. D. 221, 352) distinguished.

INTERPLEADER ISSUE.

The material facts were as follow:—

In January, 1878, W. M. Rochfort executed a mortgage to the defendants, the Land and Finance Corporation, Limited. In 1879, Rochfort executed a bill of sale (dated the 9th of December) to the plaintiff, Tomlinson, on his goods. On the 8th of August, 1880, an order was made to wind up the Land and Finance Corporation, Limited, and on the 22nd of December an official liquidator was appointed. On the 30th of May, 1884, judgment for 91*l.* 13*s.* 6*d.* was obtained in an action by the Land and Finance Corporation, Limited, against Rochfort, and on the same day a writ of fieri facias was issued and lodged with the Sheriff of Middlesex. On the 31st of May the sheriff seized the goods in the possession of Rochfort. On the 4th of June, Tomlinson gave notice to the sheriff that he claimed the goods seized. By an order of a master dated the 9th of June it was ordered that upon payment of the sum of 75*l.* into court by Tomlinson and of possession money, the sheriff should withdraw from the possession of the goods seized by him, and that the parties should proceed to the trial of an issue in the High Court of Justice, in which the claimant, Tomlinson, should be plaintiff, and the execution creditors, the Land and Finance Corporation, Limited, should be defendants, and that the question to be tried should be whether at the time of the seizure by the sheriff, the goods were the property of the claimant as against the execution creditors. The money was paid into court, and the interpleader issue was delivered on the 16th of June. A master refused an application by the plaintiff in the issue, that the defendants should give security for costs, the ground of the application being that the defendants were being wound up compulsorily and were insolvent and would be unable to pay costs if the plaintiff were successful, and thereupon the plaintiff appealed to Denman, J., who referred the matter to the Court. The Queen's Bench Division (Lopes and Cave, JJ.) ordered that the defendants should give security for costs to the extent of 30*l.* The defendants appealed to the Court of Appeal.

R. T. Reid, Q.C., and *A. G. McIntyre,* for the defendant company. It must be admitted that if the defendant company were the plaintiff in the interpleader issue, it would be bound to give security for costs (1); for it is limited and is insolvent and is in liquidation, and by the present practice under Rules of the Supreme Court, 1883, Order LVII., r. 15, the Court has full power to order security for costs to be given. But the defendant company is really a defendant: it is primâ facie entitled to the benefit of the execution issued on its behalf in the action brought against Rochfort, and the onus of proof lies upon the plaintiff in the issue to defeat the title of the company arising upon the seizure under the writ of fieri facias; the plaintiff in the present interpleader issue is a real plaintiff, and cannot call upon the defendant company to give security for costs. But even if the defendant company were to be regarded in the light of a plaintiff, it could not be called upon to give security; for in *Belmonte* v. *Aynard* (2) it was held in effect that one plaintiff in an interpleader issue cannot call upon another plaintiff to give security for costs: that case was decided upon the statutes formerly existing, but the practice under Order LVII. is the same. The plaintiff, Tomlinson, may rely upon *Williams* v. *Crosling* (3), but that case probably turned upon its special circumstances. *Melin* v. *Dumont* (4) may appear to support the contention for the plaintiff, Tomlinson; but the report is very unsatisfactory, and it is difficult to know upon what ground the Court proceeded, the facts being imperfectly stated. If the goods claimed by Tomlinson had not been in the possession of the judgment debtor, the burden of proof would have lain upon the execution creditors, and they would have been properly made plaintiffs in the issue; but they were rightly made defendants, and cannot be called upon to give security for costs.

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(1) See Companies Act, 1862 (25 & 26 Vict. c. 89), s. 69.

(2) 4 C. P. D. 221, 352.

(3) 3 C. B. 957.

(4) 17 W. R. 673.

T. Willes Chitty, for the plaintiff, Tomlinson, was stopped in his argument.

BRETT, M.R. In this case the sheriff has interpleaded. As a rule, where a sheriff interpleads, the execution creditors have taken the first step in the proceedings by issuing a writ of fieri facias upon the judgment, which they have obtained against the execution debtors: this writ is lodged with the sheriff, who acts upon it by seizing chattels supposed to belong to the execution debtors. If the chattels are claimed under an alleged title which is inconsistent with the supposed property of the execution debtors, upon the sheriff interpleading the execution creditors will have to prove that they are entitled to the chattels seized: it is true that the execution creditors are usually made defendants in the interpleader issue, but they have to assert their right, and substantially are plaintiffs; and in this view, as it seems to me, *Williams* v. *Crosling* (1) was rightly decided. At common law, the position of both the execution creditors and the claimants of the chattels depended upon the steps which the sheriff might take: according to what the sheriff did, each might be a plaintiff. Then the Interpleader Act (1 & 2 Wm. 4, c. 58), and subsequent statutes relating to interpleader were passed: under those statutes both the execution creditors and the claimants were plaintiffs, neither were defendants in point of fact, although on the record, as a matter of convenience, one party was made plaintiff, and the other defendant. And, therefore, the rule, that a defendant shall not be compelled to give security for costs, does not apply to a defendant in a sheriff's interpleader. By Rules of the Supreme Court, 1883, Order LVII., r. 15, "the Court or a Judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable." Therefore the Court has a discretion, and if either of the parties to the issue arising out of a sheriff's interpleader be a limited company and be insolvent, it may be compelled to give security for costs. I think that this appeal must be dismissed. The view which we have here adopted is not necessarily to be followed as a stringent rule in every case: our ruling is not inconsistent with *Belmonte* v. *Aynard* (1), which was not a case of a sheriff's interpleader.

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(1) 3 C. B. 957.

BOWEN, L.J. I am of the same opinion, and for the same reasons. The claimant to goods seized under a writ of fieri facias is usually bound to prove his title to them upon the trial of the interpleader issue; but this does not put the execution creditor into the position of an ordinary defendant; and when an interpleader issue has been directed and the sheriff has slipped out of the dispute, the parties who remain, that is, the execution creditor and the claimant, are both plaintiffs, they are not in the position of the parties to an ordinary action. The hand of the Court is set free, and it may use its discretion whether security for costs should be ordered. I agree with what has been said by the Master of the Rolls. In *Belmonte* v. *Aynard* (1) the position of the parties was complicated, and it was not the case of a sheriff's interpleader. In the present case the issue has been directed on the application of the sheriff; and it seems to me that the substance and not the form of the proceeding must be looked at: in that point of view the defendant company is really a plaintiff, and being insolvent is liable to give security for costs.

Appeal dismissed.

Solicitor for plaintiff: *J. J. Harlow.*

Solicitors for defendants: *Smiles, Binyon & Ollard.*

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(1) 4 C. P. D. 221, 352.

J. E. H.

[IN THE COURT OF APPEAL.]

1884
Dec. 3.

DALLOW *v.* GARROLD.
EX PARTE ADAMS.

Solicitor—Lien—Charging Order—Garnishee Summons—Priority— 23 & 24 *Vict. c.* 127, *s.* 28.

The proceeds of a fi. fa., issued on behalf of the successful plaintiff in an action, were attached in the hands of the sheriff by a garnishee summons from a county court to answer a judgment obtained against the plaintiff in that court. The plaintiff's solicitor in the action, who had received notice of the service of the garnishee summons, subsequently obtained an order under 23 & 24 Vict. c. 127, s. 28, charging the fund recovered with costs of the action remaining due to him:—

Held, that such order was rightly made, and the solicitor's claim was entitled to priority over the claim of the judgment creditor of the plaintiff under the garnishee summons.

Decision of the Queen's Bench Division (13 Q. B. D. 543) affirmed.

APPEAL of T. Davies from a decision of Pollock, B., and Lopes, J., rescinding an order of Smith, J., and affirming an order of Denman, J.

The facts of the case are fully stated in the report of the proceedings before the Queen's Bench Division (1), and it is only necessary to state here that the plaintiff having recovered judgment, the sheriff levied a sum of £111 16*s.* 2*d.*, representing the judgment debt, costs, interest, and costs of execution. A garnishee summons, issued upon a judgment obtained in a county court, was served on the sheriff on behalf of the appellant, T. Davies, who had obtained judgment against the plaintiff Dallow in that court, attaching all debts due to Dallow. An application for a charging order in favour of Adams, the plaintiff's solicitor in the present action, who had had notice of the garnishee summons, was subsequently made, and Denman, J., granted a charging order. Smith, J., afterwards rescinded the charging order.

It further appeared that the trial of the present action was opened before Lopes, J., at the Assizes and was then referred, and an award was subsequently made in respect of the claim and counterclaim of the sums mentioned in the report of the proceedings before the Queen's Bench Division. (1)

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(1) 13 Q. B. D. 543.

Dec. 2, 3. *A. T. Lawrence*, and *W. E. Hume-Williams*, for the judgment creditor, T. Davies. First, the garnishee summons attaches this sum in the hands of the sheriff before the charging order is made, and he holds it merely as trustee for the person having obtained the garnishee summons.

[BRETT, M.R. But does a garnishee summons nisi indefeasibly attach a debt before it is made absolute?]

Order XXIV., r. 4, of the County Court Rules, 1875, provides that when the summons has been personally served, it shall attach the debt. This principle has also been recognised in *In re Stanhope Silkstone Collieries Co.* (1) and in *Hamer* v. *Giles.* (2) These authorities apply to orders nisi with reference to suits in the superior courts, but precisely the same reasoning applies to a garnishee summons under the County Court Rules. Secondly, nothing in 23 & 24 Vict. c. 127, s. 28, indicates an intention on the part of the legislature to give the charging order thereby authorized to be made priority over previous incumbrances. A solicitor, having recovered a sum of money, is entitled to an order, which shall give him the right of a judgment creditor over that sum; but if another judgment creditor attaches the sum first, the solicitor cannot oust him: the words in the statute "which shall operate to defeat" cannot be carried to that length. In *Birchall* v. *Pugin* (3) the right of the solicitor was upheld expressly on the ground that he had taken the first step. Thirdly, if the decision of the Queen's Bench Division is to stand, it practically amounts to this, that a solicitor is entitled to a lien as soon as he recovers a fund, even though the fund is not in his possession. In that view the statute is abortive: the solicitor does not require the protection of a charging order, if he has a lien without it. If he has no lien until a charging order is made, in this case nothing was left for the charging order to attach, because the fund having been previously garnished in the hands of the sheriff, the sheriff held it merely as trustee for the judgment creditor, and had no interest which the solicitor could attach. Fourthly, *Faithfull* v. *Ewen* (4) and *Shippey* v. *Grey* (5) are really in favour of the judgment

(1) 11 Ch. D. 160.
(2) 11 Ch. D. 942.
(3) Law Rep. 10 C. P. 397.
(4) 7 Ch. D. 495.
(5) 49 L. J. (Q.B.D.) 524.

creditor. Both decisions rest on special facts. In the former case the parties knew of the solicitor's right and attempted to deprive him of it before he could move. In the present case the solicitor did not attempt to get his order until long after the garnishee summons was served. In *Shippey* v. *Grey* (1) Brett, L.J., was of opinion that he would not have given priority to the charging order if an execution had been actually carried out: that is a dictum precisely in point. This fund had actually been taken in execution when the order in favour of the solicitor was made: *Hough* v. *Edwards* (2); *Eisdell* v. *Coningham.* (3) Fifthly, this order should have been made by the judge who heard the case opened. He alone knew anything of the facts, and a charging order is a matter of personal discretion with him: *Higgs* v. *Schrader.* (4) Sixthly, the money held by the sheriff was in a great measure recovered for Dallow's costs. Therefore the sum attached by the solicitor was made up chiefly of money representing costs. Costs are not "property" such as a solicitor can attach under the Act. That which a plaintiff recovers for another and in order to pay another's work, cannot be his "property."

[LINDLEY, L.J. In *Beavan* v. *Earl of Oxford* (5) it was held that a judgment creditor was not a "purchaser" within the meaning of the statute 27 Eliz. c. 4, and had, therefore, no title on that ground to set aside a prior voluntary settlement. Is the appellant a "purchaser" within 23 & 24 Vict. c. 127, s. 28 ?]

It was held in *Ex parte Joselyne, In re Watt* (6), that a judgment creditor, who, before the filing of a liquidation petition by his debtor, had obtained a garnishee order nisi attaching debts due to the debtor, was a secured creditor within the meaning of the Bankruptcy Act, 1869.

Hollams, for the plaintiff's solicitor, Adams, was not called upon to argue.

BRETT, M.R. This case has been ingeniously argued, and it has been contended that although a judgment for debt and costs has been obtained through the instrumentality of a solicitor, nevertheless he has no title to a charging order, and that the

(1) 49 L. J. (Q.B.D.) 524.
(2) 26 L. J. (Ex.) 54.
(3) 28 L. J. (Ex.) 213.
(4) 3 C. P. D. 252.
(5) 6 D. M. & G. 507.
(6) 8 Ch. D. 327.

sum of money recovered for costs is not "property" within the meaning of 23 & 24 Vict. c. 127, s. 28. But it is something which has been recovered, the debt and the costs were originally in the hands of the judgment debtor, and were recovered from him through the writ of fieri facias issued to the sheriff. Whilst the money was in the hands of the sheriff, the garnishee summons was served upon him, and afterwards the charging order was obtained on the property recovered in the action, and the question is, whether the solicitor or the person issuing the garnishee summons is entitled to priority. That is to be determined by the words of 23 & 24 Vict. c. 127, s. 28. Several questions arise upon this provision in the statute. It is enacted that "in every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved." In the present case the action was depending before the Court, and it had not been fully heard by the judge at the trial. The statute is adapted to the practice actually existing, and the word "Court" includes the judges thereof, that is to say, the judges of the Court represent the Court: therefore Denman, J., being a judge of the Court, had jurisdiction to make the charging order. A further question is, whether the charging order is to be defeated by the garnishee summons. It is enacted by s. 28, that "all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a bonâ fide purchaser for value without notice, be absolutely void and of no effect as against such charge or right." The garnishee summons is an act "which operates to defeat the charging order:" it is, therefore, primâ facie void, unless it is "made to a bonâ fide purchaser for value without notice." Does Davies, the judgment creditor of the plaintiff Dallow, fall within this exception? It has in effect been argued that he does, and that any person who bonâ fide issues a garnishee summons, is a purchaser without notice. I really think that the statute means what it says: it means a person, who has actually purchased without notice the "property preserved or recovered," and who has paid in money the price for it. In the present case it seems to me that the solicitor has a charge upon the sum remaining in the hands of the sheriff, and that the facts before us cannot be distinguished in principle from those in *Shippey* v. *Grey*. (1) The doctrine laid down in that case must be applied to this: the decision in it was founded upon that in *Faithfull* v. *Ewen* (2); it was a decision of the Court of Appeal, and is supported by the long string of authorities which were cited during the argument of it, and I venture to think that the view therein taken by me was correct, although perhaps it was not expressed in the most accurate language: the argument addressed to us has been clear, but it has not explained away the effect of *Shippey* v. *Grey*. (1) Upon principle and authority I think that the judgment of the Queen's Bench Division was right, and that the true result of all the cases was correctly stated by Pollock, B. I am sorry that this appeal should be brought before us in respect of a sum which is little more than 10*l*.

LINDLEY, L.J. It seems to me that the decision appealed from was correct, and I need add only a few comments upon the matter before us. Davies, the judgment creditor in the county court of the plaintiff Dallow, is seeking to attach money in the hands of the sheriff; but a judgment creditor is not a "purchaser" within 23 & 24 Vict. c. 127, s. 28, any more than he is within 27 Eliz. c. 4, to which I have referred. In the present case Davies must be presumed to have had notice of the probability that the charging order might be obtained. Then it is said that Davies by issuing the garnishee order had priority in point of time; it is true that the solicitor had not as yet acquired his lien, but he had what may be called an inchoate right, which cannot be defeated by any "conveyance" or "act." In *Haymes* v. *Cooper* (3) it was held by Lord Romilly that the lien of a solicitor for his costs on a fund recovered by his exertions cannot be affected by an assignment of the fund by the client, nor by a stop order obtained by the assignee. Cases may be cited from the Courts of Admiralty, Common Law, and Chancery, in favour

(1) 49 L. J. (Q.B.D.) 524.
(2) 7 Ch. D. 495.
(3) 33 Beav. 431.

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of the view which we take, and we should be running counter to a long string of authorities if we were to decide against the validity of the charging order.

Appeal dismissed.

Solicitors for applicant: *Roberts & Barlow.*

Solicitors for judgment creditor: *Matthews & Garrold.*

J. E. H.

1885

Jan. 15.

[IN THE COURT OF APPEAL.]

LINE AND OTHERS, PETITIONERS; WARREN, CHECKLEY, AND BROMWICH, RESPONDENTS.

Municipal Election—Election of Town Councillors—Petition against some only of the Candidates returned on a Ground affecting the Validity of the Election as a whole—Municipal Corporations Act 1882 (45 *&* 46 *Vict. c.* 50), *ss.* 87, 88, 91, 93, 242, *Sch.* 3, *Part II., rr.* 3 *and* 10—*Appeal—Municipal Election Petition—Special Case—Supreme Court of Judicature Act,* 1881 (44 *&* 45 *Vict. c.* 68), *s.* 14.

An election petition may be presented under the Municipal Corporations Act, 1882, s. 87, against some only of the persons returned at a municipal election, although the ground of the petition is one affecting the validity of the election as a whole; and the Court can on such petition declare the persons so petitioned against not to have been duly elected.

The three respondents and six other persons were nominated as candidates to fill four vacancies in the town council of a borough under the Municipal Corporations Act, 1882. An objection having been made to the nomination papers of H., and three other candidates (not the respondents), on the ground that they were invalid under Sch. 3, Part II, rule 10, because the persons subscribing the paper in each case had subscribed nomination papers of other candidates, the mayor erroneously held the objection to be good, being of opinion that rule 10 applied to a case where there were several vacancies. The objection to H. was withdrawn; but the three other candidates objected to were prevented from going to the poll, and at the election which was afterwards held, H., and the three respondents were declared duly elected. Upon a petition against the return of the respondents, to which H. was not a party, it was admitted that an election of town councillors where there are several vacancies, is governed by the Municipal Corporations Act, 1882, Sch. 3, Part II., rule 3, which provides that the same burgesses may subscribe as many nomination papers as there are vacancies, and that rule 10 does not apply to a case of several vacancies; and it was further admitted that as the objection would have been valid against all the candidates returned, the whole election might have been declared void if H. had been a party to the petition; but it was contended that as he was not before the Court, and therefore as his election could not be questioned, the return of the respondents must stand good:—

Held, that although the erroneous decision of the mayor affected the validity of the whole election, nevertheless the Court had power to deal with those candidates returned who were petitioned against, and that the return of the respondents must be declared void, notwithstanding that the return of H. could not be questioned, he not being a party to the petition.

Judgment of the Queen's Bench Division (ante p. 73) affirmed.

Notwithstanding s. 93, subs. 7, of the Municipal Corporations Act, 1882, which enacts that the decision of the High Court upon a petition questioning a municipal election shall be final, nevertheless an appeal, if leave be given, lies from a judgment of the Queen's Bench Division upon a petition of that nature to the Court of Appeal, owing to s. 242 of the statute above mentioned, which in effect incorporates the Supreme Court of Judicature Act, 1881, s. 14, whereby in certain cases an appeal is allowed from the High Court of Justice to the Court of Appeal, if special leave be given.

APPEAL of the respondents to a municipal election petition from the judgment of the Queen's Bench Division in favour of the petitioners.

The facts of the case are stated in the report of the proceedings before the Queen's Bench Division (1), and also may be gathered from the above head-note.

The Queen's Bench Division had given leave to appeal.

Jan. 14. *Yarborough Anderson* (*Montague Shearman*, with him), for the petitioners. There is a preliminary objection to this appeal. The case raised by the petition was stated as a special case, and by s. 93, sub-s. 7, of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), the decision of the High Court on such special case is to be final. There cannot therefore be any appeal from such a decision.

Lewis Coward, for the respondents to the petition. By s. 14 of the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68), the jurisdiction of the High Court to decide questions of law upon appeal under, inter alia, the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60), is to be final unless special leave be given to appeal, and here such special leave has been given. The Corrupt Practices (Municipal Elections) Act, 1872, is incorporated with the Municipal Corporations Act, 1882, in the following manner: Sect. 242, sub-s. 3, of that last-named

(1) Ante, p. 73.

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Act enacts that where any Act "refers to the Municipal Corporations Act, 1835, or to any Act amending it," the reference shall be deemed to be to the Municipal Corporations Act, 1882. Now the Corrupt Practices (Municipal Elections) Act, 1872, by s. 29, repeals ss. 54 to 56 of the Municipal Corporations Act, 1835, and as it only repeals that statute in part and not altogether, it is an Act amending it; and consequently s. 14 of the Supreme Court of Judicature Act, 1881, must now be deemed to refer to the Municipal Corporations Act, 1882, and so it enables this appeal to be brought, special leave having been given.

BRETT, M.R. We think we ought to hear this appeal.

Jan. 15. The appeal was heard upon the merits.

Lewis Coward, for the respondents to the petition. The judges of the Queen's Bench Division have held that it is competent to them to annul the return of the respondents, although Harris is not a party to the proceedings; this view cannot be maintained. The decision of the mayor in allowing the objections to the nomination papers was erroneous; and under the Municipal Corporations Act, 1882, sch. 3, pt. 2, r. 14, it may be reversed upon a petition questioning the whole election. The petition does not allege against the respondents a personal disqualification, the ground relied upon is an objection which vitiates the whole election. The respondents cannot be unseated without declaring the whole election void; and a petition with that object might have been presented under s. 87 of the statute already mentioned. In cases of a similar nature to the present, it has been held that the proper course is to declare the whole election void: *Howes* v. *Turner* (1); *Budge* v. *Andrews*. (2) But the election cannot be declared void in the absence of Harris, who also was returned. As he is not a respondent to the petition, no order can be made affecting his return, and it follows that the three respondents to the petition are entitled to retain their seats and to have judgment entered for them upon the petition.

Yarborough Anderson, and *Montague Shearman*, for the petitioners, were not called upon to argue as to the merits.

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(1) 1 C. P. D. 670.

(2) 3 C. P. D. 510.

BRETT, M.R. In this case four candidates have been elected as councillors. There were other candidates who might have been elected, and ought to have been allowed to go to the poll. The mayor erroneously rejected those other candidates. The erroneous decision of the mayor certainly gave a right to question the whole election, and I think it gave a right to question the return of each and every one of the candidates elected. To whom does the Municipal Corporations Act, 1882, give that right? It gives that right to every burgess. The burgesses, who have objected, have not petitioned against the whole election; but they could certainly have objected to the return of each and every one of the candidates returned. A petition against all the candidates returned would have been valid. But those, who have petitioned in this case, have petitioned against the return of only three candidates. If nobody else but these petitioners could petition, I think it would be a strong argument for saying that the Act of Parliament meant that they must petition against all the candidates returned; but any other burgesses might have petitioned against Harris. Therefore to hold that, under the circumstances of this case, Harris's election will stand good, does not do any real injustice. It may be that every elector in that municipal constituency is now of opinion that Harris is a man who ought to be elected, and that every one of them was in his favour at the time for presenting a petition. Yet it is said that a petition cannot be presented against the return of the other candidates without questioning his. It would seem to me to be very strange legislation if that were so, and I cannot think that it is the law. Here the petition is presented, I take it, under the Municipal Corporations Act, 1882, sch. 3, part 2, rule 14, which is as follows: "The decision of the mayor shall be given in writing, and shall if disallowing an objection, be final; but if allowing an objection, shall be subject to reversal on petition questioning the election or return." That means "questioning the whole election or the return," and "questioning the return" must mean "questioning the return of any person returned." What is the form and prayer of the petition before us? It clearly is against the return of the three candidates who are the respondents. Therefore the objection really comes to this, that the return of not one of the three respondents can be questioned, although it is admitted that the return of each of them is bad and void, because the return of a fourth candidate is not questioned. I must ask the question, where is the law which says so? Nothing in the general law says that all the candidates are responsible each for the other. Is there anything in the Municipal Corporations Act, 1882, which says that? Certainly not. Clearly in many cases the return of one candidate may be bad, where the return of all the rest is good. Suppose that each and every one of four candidates is guilty of bribery, and somebody petitions against three of them, but not against the fourth; can it be tolerated that they should admit that they have been guilty of bribery, and at the same time should be at liberty to contend that as the fourth candidate has been guilty of bribery, their return cannot be questioned, because his is not questioned? Nothing can be found in the statute to support a contention of that kind. We must take no notice of Harris. We cannot say anything about him, because he is not before us. We have no right to say that his return is bad. We have no right to express a judicial opinion about it. Therefore I can see no objection to questioning the return of each of these three candidates as is done in this petition, and the judgment which was given in this case by my Brother Mathew, and which is under review, is right, and I think that this appeal must be dismissed.

Neither of the two decisions cited during the argument, *Howes* v. *Turner* (1) and *Budge* v. *Andrews* (2), is in point for the present case; for in each of them all the candidates elected were before the Court.

COTTON, L.J. This appeal has been ably argued, but the arguments have failed to convince me that the decision appealed from is wrong. I think it is right. A petition has been presented against three of the four candidates who were elected, and the objection taken is that that petition is wrong, because it does not join as respondent the fourth candidate elected, Harris. Let me look at the Municipal Elections Act, 1882, first of all. Upon the construction of that Act, to my mind it is clear that the election

(1) 1 C. P. D. 670.

(2) 3 C. P. D. 510.

or return of any one may be petitioned against, or that the whole election may be questioned. Sect. 87 enacts that "A municipal election may be questioned by an election petition on the ground (*a*) that the election was as to the borough or ward wholly avoided by general bribery, treating, undue influence, or personation." Then sub-s. (*b*) enacts, "That the election was avoided by corrupt practices," that is, "avoided," not "wholly avoided;" that must be in contradistinction to "wholly avoided." Now when I come to sub-ss. (*c*) and (*d*), I find them to be that "the person whose election is questioned was at the time of the election disqualified, or that he was not duly elected by a majority of lawful votes." Then I come to s. 88. That relates to the presentation and service of the petition. Sub-s. 2 enacts that "Any person whose election is questioned by the petition, and any returning officer, of whose conduct a petition complains, may be made a respondent to the petition." That recognises the same result again. Then I come to s. 91, sub-s. 3, which provides that though a petition may be presented as against two or more of those elected, it is to be treated as a separate petition against each, that is to say, it may as regards some be declared to be a good petition and their election may be held to be bad, and it may be held that the election of another candidate was good. Therefore it is quite clear to my mind that this Act does contemplate not only a petition to set aside the election of the whole number of candidates, but also a petition which questions the return or the election of individuals without joining all. But it has been contended before us that this objection being good is equally an objection against Harris, who is not before the Court, and it has been argued very correctly that we cannot declare Harris's election to be bad without having him before us. It is also said that, as the petitioners are seeking to set aside the return of the respondents on a ground applicable to the election as a whole, all those who have been elected should be made respondents, but that this petition does not seek to set aside the whole election. It is true that it seeks to set aside the election of three on grounds equally applicable to the fourth, and if the fourth had been joined then the election would have been set aside, because every one of the candidates returned would have been shewn not to have been duly elected, that is to say, because the objection to each of the candidates affects the whole election, and therefore the whole election is void. But this petition does not ask for a declaration that the whole election is avoided. In my opinion the true view is this: there is an objection which is fatal to the election of these three candidates. Will the Court hold that they are not duly elected? Ought the Court to abstain from so holding simply because there is another person whose election is open to the same objection, and against whom no order can be made? What is the consequence? The Court has not declared that the whole election is void, but it holds that the objection which has been taken to the only persons whose election is questioned is fatal, the objection coming under s. 87, sub-s. (*d*), namely, that these three respondents were not elected by a majority of lawful votes. If the other candidate returned had been brought before the Court in due time, the same order would have been made against him. He is in such a position that, although there was an objection to his election, the time has elapsed during which his election could be questioned, and he remains an elected town councillor of Daventry. In my opinion the order appealed from is right.

LINDLEY, L.J. I am of the same opinion. It appears to me only necessary to study carefully the sections which have been alluded to (I mean ss. 87, 88, and 91), and the rules in the third schedule, part 2, in order to decide that it is competent for these petitioners to present a petition like this. They say, "Four candidates have been elected; one of them, Harris, is a political friend of ours; we do not intend to quarrel with his election; we leave our opponents to do that. But we do intend to quarrel with the other three." The respondents say: "You cannot do that; that is not law; by law you must quarrel with your friend's election as well as your opponents'." Now I do not find that laid down in the Act of Parliament; on the contrary, it appears to me upon scanning the sections carefully that it is left to every burgess to present a petition against those to whose return he chooses to object. The practical consequence of that decision is this: that this petition is competent and right and unobjectionable in form, and those who object to Mr. Harris could petition against him, if they were not too late; but they are too late.

Appeal dismissed.

Solicitors for petitioners: *Caister & Shearman.*

Solicitors for respondents: *Kingsford, Dorman, & Co.*

J. E. H.

STEWART & CO. *v.* THE MERCHANTS MARINE INSURANCE COMPANY, LIMITED.

Feb. 28.

Insurance (Marine)—Memorandum against Average under 3 per cent.—Adding distinct successive Losses together—Time Policy.

In a time policy of marine insurance the ship was warranted free from average under 3 per cent. unless general, or the ship be stranded, sunk, or burnt:—

Held, following *Blackett* v. *Royal Exchange Assurance Co.* (2 C. & J. 244), that distinct successive losses on the ship during the period insured, each less than 3 per cent., but in the aggregate amounting to more than 3 per cent., were not within the exception and were to be borne by the underwriters.

STATEMENT OF CLAIM.

That plaintiffs were interested to the extent of 1000*l.* under a marine policy of insurance for that amount, dated the 16th of January, 1882, on the steamer *Wyndcliffe*, and subscribed by the defendants for 1000*l.*, the particulars of which were: ship valued at 9000*l.*, machinery at 3000*l.* To pay average on each valuation separately or on the whole. Time, twelve calendar months from noon of the 11th of January, 1882, to noon of the 11th of January, 1883; premium to defendant 7*l.*, 71*s.* per cent. Perils insured against causing loss: of the seas, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the ship. The claim was for 46*l.* 18*s.* 2*d.* in respect of a loss of 4*l.* 13*s.* 10*d.* per cent.

Defence referring to the policy for its full terms. That the policy contained the following warranty: "The ship and freight shall be and are warranted free from average under three pounds per cent. unless general, or the ship be stranded, sunk, or burnt." That the loss was not a general average loss, and the vessel was not stranded, sunk, or burnt during the period insured, and that no particular average loss amounting to or exceeding 3 per cent. on either valuation separately or on the whole accrued during any one voyage in the period covered by the policy, and that the loss was the aggregate of several distinct particular average losses to the ship, which was valued at 9000*l.*, each of which occurred during a separate and distinct voyage, and each of which amounted to less than 3 per cent. on the sum of 9000*l.*, but the defendants admitted that the aggregate of the losses amounted to a sum exceeding 3 per cent. on the sum of 9000*l.*, and that all the losses occurred within the period insured. That the loss was therefore one for which the defendants were not liable under the terms of the policy.

The reply substantially admitted the facts stated in the defence.

Hilbery, for the plaintiffs. The question is simply whether in this case the plaintiffs can recover upon an ordinary time policy with a warranty against particular average under 3 per cent. During the first six months covered by the insurance the ship sustains a particular average loss under 3 per cent. During the next six months there is a similar loss under 3 per cent. The losses added together are more than 3 per cent. There is no statement of any usage as to the time when the amount of the average is to be computed. *Blackett* v. *Royal Exchange Assurance Co.* (1) is in the plaintiffs' favour. There the policy was on the ship *Thames* "at and from London to Calcutta," free from average under 3 per cent. The defendants contended that several partial losses, each in itself less than 3 per cent., but amounting in the aggregate to more than 3 per cent., could not be lumped together to take the case out of the exception contained in the memorandum. It was held that the exception must be taken most strongly against the insurers, and that they were responsible. It is true that this was the case of a voyage and not of a time policy, but there is nothing in the judgment to suggest that anything turned on this distinction. There is nothing to prevent a voyage lasting the whole period covered by a time policy, and it cannot be that what happens during part of the voyage should be excluded.

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(1) 2 C. & J. 244.

There are two American cases on the subject: *Donnell* v. *Col. Insurance Co.* (1), where Story, J., followed *Blackett* v. *Royal Exchange Assurance Co.* (2), and *Brooks* v. *Oriental Insurance Co.* (3), which may be cited for the defendants, but is not conclusive. In Phillips on Insurance, s. 1780, the question—whether successive losses can be added together, and a claim made if the aggregate exceeds the rate of the exception—in the case of ship as well as cargo, is discussed, and it is said that the weight of authority leads to the conclusion that the exception applies to the aggregate of successive losses on the ship, in the same manner as on the cargo. The defendants really propose to alter the words of the warranty and to make it run, " warranted free from average upon any one voyage under 3 per cent." [He also cited Arnould on Marine Insurance, vol. ii., p. 801.]

Barnes, for the defendants. Upon the true construction of the policy the average referred to in the warranty must be taken to mean average occurring during each separate voyage. The frame of the instrument is that of an ordinary voyage policy, and the intention of the parties must be that what occurs on each voyage shall be kept distinct from the rest. The particulars delivered by the plaintiffs (4) shew that the average losses occurred on three voyages and during three distinct contracts for the hire of the ship. It is well known that the memorandum was first introduced to protect the underwriters from liability to small averages: *Wilson* v. *Smith* (5), and the words are "average unless general." But general average can only arise on a particular voyage, because the interests on subsequent voyages are different. Ship and freight are warranted free from average. The freight is in respect of a particular voyage, and has no relation to the period of insurance. There may be a difficulty in ascertaining the average until the close of the voyage, but in a time policy the ship may be examined from time to time and the average ascertained. The true principle upon which the insurer is entitled to an indemnity is that the indemnity shall be when the loss occurs. As to the authorities, *Blackett* v. *Royal Exchange Assurance Co.* (2) is not opposed to the defendants' contention. *Brooks* v. *Oriental Insurance Co.* (1) is decidedly in their favour. And in Stevens and Benecke on Average, p. 401, it is expressly stated that under this warranty the claim for one accident must amount to 3 per cent.

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(1) 2 Sumn. 366.

(2) 2 C. & J. 244.

(3) 7 Pick. 259.

(4) These particulars were referred to by consent.

(5) 3 Burr. 1551.

Hilbery, in reply. The passage in Benecke on Average cannot be regarded as an authority. The use of the words "ship and freight" in the warranty do not favour the defendants' construction, for that part of the policy which relates to the ship only must be considered.

Cur. adv. vult.

Feb. 28. STEPHEN, J. The question raised in this case is one of considerable difficulty. The action is upon a marine policy to recover the loss sustained from damage to the steamer *Wyndcliffe* by perils of the seas, and the defence is that the damage is a particular average loss which does not exceed the limit excluded by a memorandum contained in the policy. Now with regard to this policy it is to be observed that the words refer to a proposed voyage, and that it is in fact the ordinary form applicable to voyage policies altered by inserting words limiting by dates the duration of the risk. The use of the common form was no doubt to save trouble, leaving any question like the present one to take its chance. It remains for me to ascertain the meaning of an instrument expressed in such embarrassing terms, and I must do the best I can. The case will probably be carried to a higher Court, and I shall give the reasons for my decision very shortly.

It is declared by the policy that the ship and freight are warranted free from average under 3 per cent. unless general, or the ship be stranded, sunk, or burnt, and the question is whether these words mean free from every average loss sustained throughout the year and which does not amount in the whole to 3 per cent., or whether it means that the underwriters are not to pay for any one average loss unless it amounts to 3 per cent. of the amount insured. The question is very bare of authority, although I was referred to several cases. *Blackett* v. *Royal Exchange Assurance Co.* (2) is the only English case. There it was held in the

(1) 7 Pick. 259.

(2) 2 C. & J. 244.

case of a voyage policy that if the aggregate losses amounted to 3 per cent. the underwriters were liable. This case is illustrated by the American decisions of *Brooks* v. *Oriental Insurance Co.* (1), and *Donnell* v. *Col. Insurance Co.* (2). *Donnell* v. *Col. Insurance Co.* (2) followed *Blackett* v. *Royal Exchange Insurance Co.* (3). In *Brooks* v. *Oriental Insurance Co.* (1), which was the case of a time policy, a different opinion is expressed on the ground that the object of the memorandum is to prevent claims against the insurers in respect of a number of trifling losses.

The result of the authorities seems to me that in the present case there is much to be said on both sides. For the plaintiffs it is argued that as in a voyage policy you are entitled to add together different average losses which occur during the voyage, so in a time policy you ought to have the same privilege. For the defendants it is argued that such a construction would tend to defeat the object with which a time policy is drawn up. But this is scarcely the question which I have to decide, I must follow the words of the policy. The state of the authorities is, that *Blackett* v. *Royal Exchange Assurance Co.* (3) is, so far as it goes, in favour of the plaintiffs. The American cases are apparently in conflict with each other, but the fact that the judgment in *Donnell* v. *Col. Insurance Co.* (2) was delivered by Story, J., has great weight with me. I give judgment for the plaintiffs for the amount in dispute with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *F. W. & H. Hilbery.*
Solicitors for defendants: *Waltons, Bubb, & Co.*

(1) 7 Pick. 259. (2) 2 Sumn. 366. (3) 2 C. & J. 244.

A. P. S.

1885

THE QUEEN *v.* DUDLEY AND STEPHENS.

In this case, which is reported ante, p. 273, it has been thought desirable to add the following statement to prevent any misconception of the effect of the case as a precedent with regard to the practice to be pursued upon a special verdict in criminal cases. Though, as stated in the report, the assizes had been adjourned until the 4th of December, the day on which the case was argued, the argument was heard by the judges, not as commissioners of assize, but as judges of the Queen's Bench Division of the High Court of Justice. Prior to the argument Sir H. James, A.G., applied that the record should be brought into Court by the clerk of indictments of the Western Circuit. This was done, and the Court directed that it should be filed. It was filed accordingly, and the argument proceeded.

A. P. S.

[IN THE COURT OF APPEAL.]

1885
Feb. 25.

THE QUEEN ON THE PROSECUTION OF JOHN ABBOTT *v.* THE COMMISSIONERS OF SEWERS FOR THE LEVELS WITHIN THE PARISH OF FOBBING AND OTHER PARISHES, IN THE COUNTY OF ESSEX.

Prescription, Liability by, of Frontager to repair Sea Wall—Extraordinary Violence of the Sea—Act of God—Sewers, Commissioners of, Order, by to repair Sea Wall, Effect of—Land Drainage Act, 1861 (24 *&* 25 *Vict. c.* 133), *s.* 33*—Disqualification of Commissioners by reason of Interest—* 23 *Hen.* 8, *c.* 5; 13 *Eliz. c.* 9.

The extent of the liability of a frontager to repair a sea wall, whether arising by tenure, prescription, or custom, can only be ascertained by usage.

J. A. was a frontager in a level on the Essex shore of the Thames under the jurisdiction of Commissioners of Sewers. An ancient sea wall protected the level against incursions of the sea. There was evidence proving a prescriptive liability on the part of the frontagers in the level to maintain and repair this sea wall. A portion of the sea wall in front of J. A.'s land was destroyed by an extraordinary storm and high tide. The wall was previously in good repair, and in a proper condition to resist the ordinary action of the sea:—

Held, on the authority of *Keighley's Case* (10 Rep. 139) and *R.* v. *Commissioners of Sewers for Somerset* (8 T. R. 312), that, in the absence of evidence sufficient to shew that the prescriptive liability of the frontagers extended to the repair of damage occasioned by extraordinary violence of the sea, J. A. was not liable to repair the damage thus occasioned to the wall at his own expense, but the expense of so doing must fall on the whole of the level.

By s. 33 of the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), it is provided that commissioners of sewers acting within their jurisdiction may, without the presentment of a jury, make any order in respect of the execution of any work, the levying of any rate, or doing any act which they might but for this section have made with such presentment, subject to a proviso that any person aggrieved by any such order may appeal therefrom to the quarter sessions.

Orders were made by the Commissioners of Sewers upon J. A. to execute repairs to the sea wall rendered necessary by the aforesaid extraordinary storm and high tide. Among the commissioners making the orders were two persons who were interested in lands in the level, liable to be rated to a general rate:—

Held, by the Queen's Bench Division, that these orders had, by virtue of the above mentioned section, the same effect as if made on the presentment of a jury, and that therefore so long as they stood they had the effect of adjudications against J. A. rendering him liable to do such repairs to the wall:

But *held* also, by the Queen's Bench Division and the Court of Appeal, that such orders must be quashed on certiorari on the ground that two of the commissioners making them were interested parties.

A MANDAMUS having issued directed to the commissioners of sewers for the levels within Fobbing and other parishes in Essex, commanding them to reimburse J. Abbott the expenses incurred by him in repairing the damage done to the sea-wall fronting Curry Marsh farm by the storm of the 18th of January, 1881, and all expenses incurred in complying with the orders of the commissioners made on the 15th of February, 1881, and the 9th of March, 1882, and to make and levy such rates as might be necessary for such reimbursement, a special case was stated by an arbitrator for the opinion of the Court: and it was agreed that an application by the prosecutor to bring up the orders of the 15th of February, 1881, and 9th of March, 1882, by certiorari, in order that they might be quashed as being invalid, should stand over until after the argument of the special case. The case was in substance as follows:

1. J. Abbott is the owner of certain freehold land in the parish of Stanford-le-Hope, Essex, known as Curry Marsh farm. The land and hereditaments are situate on the Essex shore of the river Thames, in Sea Reach, and form part of the levels within the limits of the parishes of Fobbing, &c., and are within the jurisdiction of the commissioners, who are appointed by a commission dated the 19th of November, 1860.

2. The records of the commissioners for the district begin from the year 1729. It is not known when the first commission for the district was issued. The commission of the 19th of November, 1860, was continued in force to the present time under the provisions of the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), s. 14.

3. The levels are bounded on the south by the river Thames. All the lands within the levels, comprising in extent about 3443 acres, lie below the level of the river at high water, and are protected from inundation at flood-tide by sea-walls constructed for that purpose. Of the 3443 acres, 2592 acres are protected by the sea-wall along the length of the southern boundary of the levels of which the Curry Marsh wall forms part. Some part of the lands is owned by persons who have no frontage to the river, and have no sea-walls on or abutting on their own land, but are protected by the sea-walls on or fronting the lands of the others. The sea-walls are ancient, and the date when they were first constructed is not known.

5. One of the sea-walls fronts Curry Marsh farm. The owners of that farm who preceded the prosecutor from time to time repaired the said wall. There is no evidence that repairs were ever done to the wall otherwise than by or at the expense of the owners of Curry Marsh farm.

6. At a Court held by the commissioners on the 18th of August, 1880, their then marsh-bailiff reported that all former orders of the commissioners had been complied with; and at a Court held on the 20th of January, 1881, he stated that he had on the 14th of January, 1881, inspected the sea-walls throughout the level, and that they were (except part of a sea-wall not fronting Curry Marsh farm) in a proper state to resist ordinary tides. In fact, at the time of the happening of the storm hereinafter mentioned, the wall fronting Curry Marsh farm was in good substantial repair and in a proper condition to resist the flow of ordinary tides and the force of ordinary storms. There was at the time of the said storm no default on the part of the prosecutor as regards the state of repair of the sea-wall, unless it was a default on his part that the wall was not, as was proved by the event, sufficient to keep out the water on the 18th of January, 1881.

7. On the 18th of January, 1881, there happened a concurrence of storm and high tide which the arbitrator found as a fact for the purposes of this case was extraordinary. The sea-wall fronting Curry Marsh farm and almost all the sea-walls on the banks of the Thames in that neighbourhood were breached by the water from the river which flowed through and over the walls of the level generally and submerged a large portion of the lands usually protected by the walls.

8. In consequence of the damage to and the destruction of part of the sea-wall fronting Curry Marsh, and of the apprehended recurrence after a short interval of unusually high tides, the marsh-bailiff, by direction of the clerk to the commissioners, gave notice to the prosecutor that it was necessary that measures should be at once taken for the repair of the said sea-wall. Such measures were accordingly taken by the prosecutor; and previously to the 15th of February, 1881, he had expended on the repairing of the said sea-wall a sum which for the purpose of the argument of this case was to be taken to be 3014*l*. 1*s*. 8*d*.

9. On the 26th of January, 1881, and the 15th of February, 1881, sessions and general courts of sewers were held by the commissioners. At the court of the 15th February, 1881, an order was made on the prosecutor to do certain repairs to the wall, under a penalty of 100*l.*

10. Subsequently to the service upon him of the order, the prosecutor continued the works which he had before commenced, and by the 18th of August, 1881, all the works required by the order to be done had been done by him to the satisfaction of the marsh-bailiff and of the engineers of the commissioners, with the exception of a small portion at the western corner. The cost of the repairs up to this date is to be taken at 5752*l.* 10*s.* 6*d.* Work was subsequently done by the prosecutor to the portion of the western corner, and that portion was in course of completion when the further slip happened, as hereinafter mentioned.

11. The whole of the work done and expenses incurred as mentioned in paragraphs 8, 9, and 10, were rendered necessary by the extraordinary storm and high tide of the 18th of January, 1881.

12. The prosecutor did not appeal from the order of the 15th of February, 1881, nor did he make any protest against his liability to do the work without reimbursement for the cost.

[Paragraphs 13 to 23 set forth facts with regard to the subsequent slip mentioned in paragraph 10, and the contentions of the parties with regard thereto, but the arbitrator found as follows:—]

24. No evidence was given of any circumstances from which it ought to be inferred that, if the storm of the 18th of January, 1881, had not taken place, the wall as it then existed would not have stood to the present day, or that the work and expenses mentioned in paragraphs 8, 9, 10, and 27 would have been necessary.

26. On the 9th of March, 1882, the commissioners held a session and general court of sewers. The prosecutor, who had notice of the holding of the court, attended with his solicitor, and submitted, that the very heavy cost of the works necessitated by the storm of the 18th of January, 1881, ought to be borne by the level; and he applied to the commissioners to make a rate for this purpose, but he did not make any formal demand on

them to do so; and they at such session made an order upon Abbott to do the necessary repairs (being those necessitated by the slip as aforesaid) at his own cost by a day named.

27. The repairs required to be done by the order of the 9th of March, 1882, as varied by agreement mentioned in par. 28, were done by the prosecutor after giving notice to the commissioners that he thereby in no way prejudiced his right to appeal against the order. In complying with the order, the prosecutor has expended 6972*l.* 16*s.* 10*d.*, which is in addition to the sum mentioned in par. 10 of this case.

28. After the order, and after the order for the mandamus to issue had been made, it was agreed between the prosecutor and the commissioners (without prejudice) that it would be less difficult and less costly and more secure to vary the position of the wall, and that the cost of so doing should be treated as part of the cost of repairing the wall pursuant to the order. This was done at a cost of 3300*l.* 6*s.* 10*d.*, which sum forms part of the 6972*l.* 16*s.* 10*d.* mentioned in par, 27.

29. The case was to be referred back to the arbitrator for the purpose of definitively assessing these several sums.

30. On the 1st of April, 1882, the prosecutor by a demand in writing required the commissioners to summon a court to make a rate to reimburse him for his expenditure in repairing the damage to the sea-wall by the extraordinary storm and unusually high tide of the 18th of January, 1881, and for the money expended and to be expended by him in complying with the orders of the 15th of February, 1881, and 9th of March, 1882.

31. On the 1st of May, 1882, the rule nisi for a mandamus, which was made absolute on the 9th of June, 1882, was obtained by the prosecutor.

32. On the 1st of June, 1882, he gave notice of appeal to the Midsummer quarter sessions for Essex against the order of the 9th of March, 1882, which appeal has from time to time been respited pending the decision of this special case.

33, 34. An examination of the records of the commissioners shews that between the year 1729 (being the date of the earliest record of the commissioners now forthcoming) and the year 1831, there were no presentments of juries finding specially any custom or prescription as to the repair of the walls, and no presentment stating in words what was the liability of the frontagers. The usage was for a jury to view the walls a few days before the meeting of the court of commissioners, and to present at such court the repairs which they found at such view to be required, specifying in the case of each work a penalty in case the work should not be done. At the court such presentments were made orders of the court.

35. The records shew instances of orders on all the owners within the levels whose lands were bounded by the sea-wall; and there is nothing in them to indicate any difference in the extent of the liability of the owners of the different lands so bounded, as to the repair of the wall bounding their respective lands.

36. In case of emergency, the marsh-bailiff was impowered to do the work, but the amount expended by him was claimed as a debt due from the owners to the commissioners; and the records shew instances of the marsh-bailiff recovering the sums expended by him by distress from the owners who were liable to repair. In some cases it does not appear from the records whether the money expended was claimed or recovered or not; but there are no cases in which it appears that it was not so claimed, or that any such claim was contested. From the small amount of the rates levied, it is apparent that no extensive repairs to the walls can have been done at the expense of the level.

37. Rates were made at the courts. They were usually made for the general purposes of the expenses of the commissioners, but sometimes for special purposes.

38. No instance appears in the records of a rate made for the special purpose of paying the expenses of repairing walls or of reimbursing any frontager for expenses incurred by him in repairing walls.

39. Except so far as the facts and documents or extracts mentioned in this special case prove or warrant an inference to the contrary, there is no evidence to shew that any of the repairs ordered to be done were other than ordinary repairs, or that any extraordinary accident happened to the walls before the storm of the 18th of January, 1881.

[Paragraphs 40 to 45 relate to an application for a new commission, the facts with regard to which are sufficiently referred to in the judgment.]

46. At a court held on the 5th of December, 1831, a presentment was made respecting the dangerous state of the sea-wall belonging to the Oil Mill farm, the property of F. Kensett, upon evidence taken in the presence of the court and jury. In this presentment the liability of the owner to repair is stated to be by ancient custom. This is the first instance in which there appears any entry upon the records of the commissioners stating in terms the liability of any owner to repair or the existence of any custom relating thereto,

50. In March, 1874, a tide occurred higher than any before then recorded (though lower than the tide of the 18th of January, 1881), and caused serious breaches in the sea-walls of the level. At a court held on the 27th of August, 1874, orders were made on all the frontagers in the level (whether the walls fronting their respective lands had been damaged by the said tide or not,) to raise their walls to a height one foot six inches above the level of the said high tide. These orders were carried out, and the damage to the walls occasioned by the said tide was repaired at the expense of the owners.

51. After the storm of January, 1881, orders were made on all the frontagers respectively in a form similar to that of the 15th of February, 1881, before mentioned, to repair the damage caused to their walls by the said storm. These orders were not appealed against, and the works were done at (in many cases) considerable expense. It must not be assumed from this that in some cases the expense to a frontager of repairing his own wall was greater than his contribution to a general rate would have been in case the repairs had all been defrayed out of such rate. No claim for reimbursement has as yet been made except by the prosecutor.

52. During the period to which living memory extends, so far as oral testimony is forthcoming, the walls have always been repaired by or at the expense of the owners of the lands which the walls respectively front, without reimbursement by the commissioners. The market value of the lands fronting the river is considerably diminished by reason of the liability to repair.

53. The commissioners contend that,—1. The facts and docu-

ments stated or referred to in the case establish that the prosecutor was under a general liability to repair the sea-wall fronting his land, and that by reason of such liability he was bound to do the repairs referred to in the case, although the necessity for such repair arose from an extraordinary storm and tide, or any other cause,—2. That the said facts and documents shew that there is no liability upon the level or any other person to repair the said wall, or to reimburse the prosecutor for the whole or any part of the moneys expended by him in such repairs,—3. That the prosecutor is debarred from obtaining the relief sought for in the present proceedings, by the existence of the orders of the 15th of February, 1881, and 9th of March, 1882, unless and until they or either of them be varied or reversed by the quarter sessions under the provisions of the Land Drainage Act, 1881, s. 47, or otherwise set aside.

54. The prosecutor contends that, even if any liability is shewn on him to do any repairs to the sea-wall, such liability is at most an ordinary liability to repair by prescription, and does not extend to repairing damage caused by extraordinary floods or storms, or to reinstating such wall after such damage; but in such case the cost should be borne by the level, according to the statute of Hen. 8, as interpreted in *Keighley's Case* (1); and, assuming the prosecutor to be liable in the first instance to pay the cost of such repair and reinstating, he is entitled to be reimbursed,—and that the orders of the 15th of February, 1881, and 9th of March, 1882, are not, nor is either of them, conclusive against the prosecutor; and, assuming them to bind him to do the repairs in the first instance, they are not inconsistent with his right to be reimbursed.

The questions for the opinion of the Court are,—1. Whether the cost of repairing the sea-wall fronting Curry Marsh subsequent to the 18th of January, 1881, under the circumstances hereinbefore mentioned, or any and what part thereof, ought to be borne by the prosecutor or by the level rateably,—2. Whether the prosecutor is entitled to be reimbursed by the commissioners the whole or part and what part of the said cost, and to have a rate or rates made for that purpose,—3. Whether, in case the prosecutor is not entitled to be reimbursed by the commissioners the whole or any part of the said cost, it is by reason of the orders of the 15th of February, 1881, and 9th of March, 1882, or either or which of them.

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(1) 10 Co. Rep. 139.

If the Court shall answer either of the first two questions in favour of the prosecutor, judgment is to be entered for the prosecutor on the special case; and such order for a peremptory mandamus or for a reference or otherwise as the Court may direct is to be made.

If the Court shall answer the first two questions in favour of the commissioners, judgment is to be entered for them.

If the Court shall answer the third question in the affirmative, the prosecutor is to be at liberty to proceed with his motion for a certiorari and with his appeal to quarter sessions, or with either of such proceedings.

The case referred to and incorporated an appendix containing voluminous extracts from the records of the commission, the effect of which, so far as material, is sufficiently stated in the judgment. It appeared from the appendix that in 1836 and 1861, at general courts of sewers holden for the level, general presentments of the jury were made presenting that the respective owners of the several lands enumerated in a schedule to the presentment (among which was Curry Marsh farm) had been from time immemorial accustomed to and ought of right to support, maintain, and repair the sea-wall to the respective extents mentioned in the schedule. The orders of the 15th of February, 1881, and 9th of March, 1882, both purported to be made upon reading the general presentment of 1861.

The special case was argued on the 7th, 8th, and 14th of March, 1884, by

Charles, Q.C. (with whom was *Channell*), for the prosecutor, and by

Meadows White, Q.C. (with whom were *Finlay, Q.C.*, and *Kenelm Digby*), for the commissioners.

The course of the argument is sufficiently indicated by the judgment. The questions in dispute between the parties were,—1. As to the extent of the liability of the prosecutor to repair the sea-wall fronting Curry Marsh farm,—2. As to his right to be reimbursed by the commissioners (by means of a general rate upon the owners of lands within the level) for the repairs which he had done to the sea-wall,—3. As to the effect of the orders to repair made by the commissioners on the 15th of February, 1881, and 9th of March, 1882,—4. As to whether by reason of his not having appealed against the first of these orders the prosecutor was concluded by it.

The following authorities were cited and commented upon:—*Rex* v. *Commissioners of Sewers for Somerset* (1); *Henley* v. *Mayor &c. of Lyme Regis* (2); *Rex* v. *Commissioners of Sewers for Essex* (3); *Reg.* v. *Leigh* (4); *Reg.* v. *Warton* (5); *Nitro-Phosphate Co.* v. *London and St. Katharine's Docks Co.* (6); *Nugent* v. *Smith* (7); *Reg.* v. *Greenhow* (8); *Hudson* v. *Tabor.* (9)

Cur. adv. vult.

May 3, 1884. The judgment of the Court (Lord Coleridge, C.J., and Cave, J.), was delivered (10) by

LORD COLERIDGE, C.J. The principal question in this case is, whether the prosecutor, who is the owner of certain lands within the jurisdiction of the commissioners on which is a sea-wall, is liable to repair damage done to that wall by the combined effects of a storm and high tide which occurred on the 18th of January, 1881.

The burden of proof is on the commissioners, who must establish the extent of the prosecutor's liability, and must then shew that the damage they allege the prosecutor is bound to repair is damage which falls within the ambit of the liability so established.

The extent of the liability of a frontager to repair a sea-wall whether arising by tenure, prescription, or custom, can only be ascertained by usage. In this case there is no living testimony as to the usage: but we have been referred to certain documents from which we have been asked to infer that the liability of the prosecutor is absolute, so as in fact to make him an insurer of the wall. These documents are presentments of juries and other papers found amongst the books and records of the commissioners.

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(1) 8 T. R. 312.

(2) 5 Bing. 91; 1 Bing. N. C. 222; B. & Ad. 77.

(3) 1 B. & C. 477.

(4) 10 Ad. & E. 398.

(5) 2 B. & S. 718.

(6) 9 Ch. D. 503.

(7) 1 C. P. D. 423.

(8) 1 Q. B. D. 703.

(9) 2 Q. B. D. 290.

(10) The judgment was written by Cave, J.

The first in date is a copy or draft of an affidavit in the handwriting of and purporting to be sworn by Edward Gepp, the then clerk of the commissioners, on the 3rd of March, 1791, for the purpose of obtaining a new commission in the place of one which had then lately expired. It appears that the petition for a fresh commission had been neglected by the then Chancellor, Lord Thurlow; and the commissioners had presented a supplemental petition, supported by the affidavit in question, which alleges that by reason of the inundation occasioned by the extraordinary high tide which happened on the preceding 2nd of February, several breaches and other injuries had happened to the sea-walls, banks, &c., and that it was absolutely necessary for the safety and preservation of the lands and marsh-grounds within the levels that immediate attention should be had for the reparation and amendment of the said sea-walls, &c.; and that until a new commission was issued no surveys could be taken or orders made to enforce such necessary reparations and amendments. The commission was ultimately issued; and at a court held on the 10th of October, 1791, about seventy orders for the repair of walls were made. There is nothing in the nature or extent of these repairs (which are of the usual character) to lead to the conclusion that the damage so repaired was other than such as might with ordinary prudence and foresight have been guarded against: and we are unable to infer from the language of the clerk, anxious for the renewal of the commission under which he held his office, that the tide spoken of by him was so high that it could not reasonably have been foreseen and guarded against, or that the damage so repaired was caused without negligence on the part of the frontagers.

In 1831, it appears from a report of one of the commissioners that the marsh-bailiff had represented that the sea-wall belonging to the Oil Mill farm was in an alarming and dangerous state from the neglect of the owner to repair pursuant to a previous presentment, and that in consequence of such neglect serious apprehensions were entertained that a breach and inundation might take place. Thereupon there was a presentment by a jury that the sea-wall in question was in a ruinous and defective state and condition for want of due reparation and amendment thereof, and that such state and condition had arisen from the negligence and default of the owner of the Oil Mill farm in repairing or amending the same as he ought to have done; and the court ordered that the works presented to be done by the jury should be made an order and decree of the court. It appears from a record of the court of the 13th of July, 1833, that these works were afterwards done by the owners of the Oil Mill farm: but it is clear from the report and from the evidence of Richard Hill Dalton given before the jury that these repairs were rendered necessary by the neglect of the owner, and not by any extraordinary flood or accident; and consequently this presentment is no authority whatever for the existence of any such liability as that now in dispute.

On the 26th of February, 1836, after the passing of the statute 3 & 4 Wm. 4, c. 22, there was a general presentment of the jury, which was much relied on by Mr. White. This presentment appears to have been made under s. 46 of that Act; but it does not appear that at this time the sea-wall was out of repair; and we are of opinion that that section does not warrant a presentment of the liability to repair where the wall is not alleged to be out of repair; and that, if the wall is out of repair in part, it only warrants a general presentment of such parts as may be out of repair. There is no power to traverse a presentment where no default is alleged; and it is obvious that a trial of a traverse of any such presentment where no default was alleged would impose an intolerable burden on the persons supposed to be affected by such presentment, as it might happen that no default would occur while they continued owners. We are also of opinion that, assuming the presentment to be good, it does not warrant the conclusion that the liability to repair extended to damage done by the act of God.

In 1843, the wall upon the Oil Mill farm was again reported to be in a very dangerous and alarming state, the same having been recently in part much reduced in height and otherwise damaged by an unusually high wind and tide, in consequence whereof imminent danger was apprehended to the levels; and at a court subsequently held it was found that the wall in question was at a part called the Steep Toe Point in a ruinous and defective state and condition for want of due reparation and amendment thereof, and by reason of the default of the owners in not having repaired and amended the same: and it was ordered that the wall should be repaired at the expense of the owners. It appears from the clerk's bill of costs that previous to this order being made a question had arisen whether the proprietors of the wall were liable to repair it after a storm, if it had previouly been in a sufficient state to resist the tide, &c.: but, as it appeared that the wall in question was not previously in a fit state to resist ordinary occurrences, the question was not gone into: and it follows that the records of 1843 do not establish the existence of any liability such as that now contended for. The entries in the bill of costs are, however, strong proof that the presentment of 1836 was not in 1843 understood to have the effect now suggested. The records of the court held on the 8th of June, 1854, do not carry the commissioners' case any further. On the 1st of August, 1861, another general presentment was made, which is open to the objections already taken to that of 1836, and to which therefore the observations previously made equally apply.

On the 6th of August, 1861, the Land Drainage Act, 1861, was passed, which by s. 33 enacts that commissioners of sewers acting within their jurisdiction may without the presentment of a jury make any order in respect of the execution of any work, the levying of any rate, or doing any act which they might but for this section have made with such presentment; subject to this proviso, that any person aggrieved by any such order made by the commissioners without the presentment of a jury may appeal therefrom in manner thereinafter mentioned.

In March, 1874, a tide occurred higher than any before then recorded (though lower than the tide of the 18th of January, 1881), and caused serious breaches in the sea-walls of the level. At a court held on the 27th of August, 1874, orders were made on all the frontagers in the level (whether the walls fronting their respective lands had been damaged by the tide or not) to raise their walls to a height of one foot six inches above the level of the said high tide. It is obvious that, as soon as it was shewn by experience that a tide of the height of that recorded in March, 1874, might occur, the danger of its recurrence was a danger that could be foreseen in the future, and might be guarded against, whether it could have been foreseen in the past or not, and consequently that the owners of the sea-walls were bound to foresee and provide against it. It is also found in the case that the damage to the walls occasioned by this tide was repaired at the expense of the owners: but we have no such evidence of the height of the tide or of the nature or extent of the damage done by it as in our opinion would justify us in finding as a fact from the usage proved that the owners of this sea-wall are bound to repair damage done by the act of God.

Mr. White relied upon the fact that, so far as can be gathered from the records, which extend back to 1729, no repairs have been done at the general expense of the level from that time to the present: and he contended that there must have been damage caused by the act of God during that period which must therefore have been repaired by the frontagers. But it seems equally clear from the records that no repairs have been done by the frontagers of such a nature as to satisfy us that they were rendered necessary by damage arising from the act of God; and the expression itself, being confined to events which cannot be foreseen, or which if they can be foreseen cannot be guarded against, points to events which are primâ facie likely to be of very unusual occurrence: and it is quite as reasonable to conjecture that nothing of the kind has happened between 1729 and 1881, as to suppose that it has taken place and that the damage has been repaired by the frontagers, without leaving any trace upon the records. Moreover, we ought not to presume anything against the prosecutor, who is virtually defending himself from an attempt to impose upon him a large and indefinite liability; and we ought to be satisfied with nothing less than would have satisfied a jury of reasonable men upon the trial of a traverse of a presentment.

As for the argument attempted to be drawn from the fact that the prosecutor did not appeal against the first order made upon him, and that the other frontagers obeyed the orders made on them to repair damage caused by the same storm,—we only notice it to shew that we have not overlooked it.

In our judgment, the commissioners have failed in proving that the prosecutor is liable to make good all damage, however caused: and we find as a matter of fact that the prosecutor is only liable to make good damage which can in some way or other be traced to his or his predecessors' negligence. (1)

The next question is whether the commissioners have proved that the damage in this case arose from the prosecutor's negligence; for, here, as before, the onus of proof is on the commissioners, as it would be if there had been a presentment of a jury which the prosecutor had traversed.

It cannot seriously be contended that the damage in this case can be traced to any such negligence. It is found as a fact that, before the storm, the wall was in good substantial repair, and in a proper condition to resist the flow of ordinary tides and the force of ordinary storms, and that, on the 18th of January, 1881, there was a concurrence of storm and high tide which was extraordinary. As to the subsidence of the wall, the cause of it is in dispute; but, whether the contention of the prosecutor or that of the commissioners be adopted, it is not proved that the subsidence could have been foreseen, or that, if foreseen, it could have been prevented; and the case expressly finds that no evidence was given of any circumstance from which it ought to be inferred that, if the storm of the 18th of January, 1881, had not taken place, the wall as it then existed would not have continued to stand to the present day. It is also a circumstance not without weight, that, previous to the storm in question, the commissioners, whose duty it is to watch over the sea-walls, did not suggest that anything required to be done to the wall to enable it to withstand the force of ordinary tides and storms. We are, therefore, compelled to come to the conclusion that the damage to the wall mentioned in the case was not such as the prosecutor was bound to repair.

There is, however, another question yet to be disposed of. It has been contended that, assuming the prosecutor was not bound to repair the damage, yet, as he has in fact repaired it under two orders of the commissioners, he is not entitled to a mandamus to the commissioners to reimburse him, so long as these orders stand. One of them is under appeal, and the other will be brought before this Court on certiorari; and it may be that both will be upset: but the point we have now to dispose of is, whether the mandamus can go while these orders stand.

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(1) See, as to this, observation of Brett, M.R., post, p. 583.

Now, by s. 33 of the Land Drainage Act, 1861, already quoted, the commissioners acting within their jurisdiction may without a presentment make any order to execute any work which they might have made with such presentment. The commissioners did by the orders in question, made respectively on the 15th of February, 1881, and the 9th of March, 1882, order the prosecutor to do certain repairs, which he has done. It was not contended by Mr. Charles, nor in our opinion could it have been successfully contended, that the commissioners in making these orders were acting outside their jurisdiction; for, it is clear that, if a jury had found as a fact that Mr. Abbott's liability was of the extensive nature contended for by the commissioners, they could and ought under the old system to have made a presentment which would have warranted the orders in question. The extent of the liability of the frontagers is one of the matters which would necessarily have had to be proved before a jury on the trial, if the presentment had been traversed; and in *Reg.* v. *Leigh* (1), the Court of Queen's Bench granted a new trial because the judge had misdirected the jury upon this very question on the trial of a presentment which had been removed into that Court by certiorari.

Mr. Charles did not contend before us that the orders were bad (not that he admitted them to be good, but that the argument on this point was reserved for this Court when the orders are before it on certiorari); but he submitted that, notwithstanding the orders, Mr. Abbott was entitled to dispute his liability, and to have this mandamus made absolute to re-imburse him for the expense he has incurred in obeying the orders.

Under the former system, the question of the liability of the frontager was put in issue by a traverse of the presentment; and, after the trial of the presentment, and verdict found against the frontager, it is impossible to conceive that, so long as that verdict stood, the frontager could dispute the liability so found against him. Mr. Charles's industry could not produce any authority to that effect; and it would be strange if the elaborate machinery of a presentment by a jury, a traverse of that presentment, and a finding of a jury upon such traverse, had been absolutely of no effect. Nor is it possible to understand why a frontager who had not traversed the presentment, and had thereby confessed it, should be in a better position than one who had traversed it unsuccessfully. The order of the commissioners is by the section already quoted to have the same effect as if it had been preceded by the necessary presentment; and an appeal to the quarter sessions is substituted for the traverse of the presentment. In our judgment, the prosecutor is bound by these orders until they have either been reversed on appeal or quashed by this Court on certiorari. We are therefore of opinion that, although the liability of the prosecutor does not extend so far as to make him liable to repair damage caused as this was, yet that, so long as the orders in question stand, he is not entitled to a mandamus to reimburse him the expenses he has incurred in obeying them.

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(1) 10 Ad. & E. 398.

It appears, however, that the repairs mentioned in par. 8 of the special case were not done under the order of the commissioners, but by the direction of the marsh-bailiff; and, as to the expense of doing these last-mentioned repairs, we hold, following *Rex* v. *Commissioners of Sewers for Somerset* (1), that the level must be at the cost of making them good, and that the prosecutor is to that extent entitled to his mandamus.

Judgment for the prosecutor, that a peremptory mandamus issue to the defendants, commanding them to reimburse John Abbott the sum of 3014*l.* 1*s.* 8*d. incurred by him previous to the* 15*th of February,* 1881, *in repairing the damage done to a sea-wall fronting Curry Marsh by the storm of the* 18*th of January,* 1881, *and to make and levy such rates and do all such acts as might be necessary for such reimbursement.*

On the 1st of May, 1882, Mr. Abbott had obtained a rule nisi for a certiorari directed to the commissioners of the Fobbing Levels to bring up the orders of the 15th of February, 1881, and the 9th of March, 1882, to be quashed on the ground, amongst others, that Thomas Mashiter and Charles Spitty, two of the commissioners by whom the orders respectively were made, were disqualified by reason of interest from acting in the matter, as being owners of lands in the level within the district, and rateable towards the repair of the sea-walls within the district.

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(1) 8 T. R. 312.

July 5, 1884. *Meadows White, Q.C.*, *Finlay, Q.C.*, and *Kenelm Digby*, shewed cause, upon an affidavit of the clerk to the commissioners which stated, amongst other things, that, if such ground for impeaching orders of commissioners were allowed, the greater part of the orders made in these and other levels for the last century would be invalid, that one of the two commissioners named was not an owner of land within the level, but only an occupier, and that there were present at the courts by which the orders were made a sufficient number of commissioners to constitute a quorum without including those interested. The difficulty which arose in *Brittain* v. *Kinnaird* (1) and *Reg.* v. *Bolton* (2) does not arise here. The commissioners, as in the case of Romney Marsh and the Bedford Level, are necessarily chosen from among the owners of lands within the district: see 23 Hen. 8, c. 5, ss. 1 and 10, and 13 Eliz. c. 9, s. 7.

[LORD COLERIDGE, C.J. The objection is not to the appointment of the persons named as commissioners, but that they are disqualified to act by reason of interest. The statutes require the commissioners acting to be "indifferent" persons, that is, persons who have no interest in the matter with which they are dealing. The word "indifferent" occurs in several parts of the statute of Hen. 8, and there is nothing in the subsequent statute to qualify that. How do you get rid of the general principle which pervades the whole administration of the law, that no man shall act as a judge in his own cause?]

If this be a valid objection, it is somewhat remarkable that it is not discussed in Callis or in any other book on the Law of Sewers.

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(1) 1 Brod. & B. 432.

(2) 1 Q. B. 66.

[LORD COLERIDGE, C.J. Possibly because the contention now relied on has never before been suggested.]

It is in practice essential that persons interested in and acquainted with the locality such as landowners of the district should be appointed on these commissions, and it would be very inconvenient if the fact that one or two out of a large number of commissioners acting at a court might turn out to be interested should vitiate the acts of the court: see *Reg.* v. *Aberdare Canal Co.* (1)

At all events, the application to quash the first order is out of time: *Reg.* v. *Tower Hamlets.* (2) It was made on the 15th of February, 1881, and the certiorari was not moved for until the 1st of May, 1882.

Charles, Q.C., and *Channell*, in support of the rule, were not called upon.

LORD COLERIDGE, C.J. Nothing can be more important than the vindication of the general principle that no man can be allowed to act as judge who is interested in the subject-matter to be adjudicated upon. That general principle, indeed, was not attempted to be controverted by either of the learned counsel who have addressed us on the part of the commissioners in this case. Nothing but the clear and unambiguous words of an Act of Parliament could warrant their contention. There is no such statutory provision. On the contrary, the statute of Hen. 8 requires that those appointed to carry out the law under these commissions, and who act as commissioners, shall be "indifferent persons,"—persons who have no interest,—and this is in no degree altered by the subsequent statute of 13 Eliz., which is merely supplementary to and which refers to the earlier statute. And it is the more important that the principle should be strictly adhered to and enforced in the case before us, seeing that the commissioners are now impowered by s. 33 of the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), to make orders for the performance of the necessary works which before that Act could only be made after a presentment by a jury, who must necessarily be indifferent and disinterested persons. Without, therefore, intending

(1) 14 Q. B. 854, 867.

(2) 5 Q. B. 357.

to cast any reflection upon the members of this commission (who are above all suspicion), it is enough to say that a person, who is interested as these two gentlemen were, has the strongest possible temptation to impose the burthen of repair upon a particular individual, and so to relieve pro tanto a rate to which he would be called upon to contribute.

For these reasons, I think the certiorari must go, and the orders must be quashed.

CAVE, J., concurred.

Rule absolute. (1)

J. S.

The defendants appealed against both the above reported decisions.

1885. Feb. 24, 25. *Meadows White, Q.C.*, *Finlay, Q.C.*, and *Kenelm Digby*, for the commissioners.

Channell (*Arthur Charles, Q.C.*, with him), for the prosecutor. In addition to the authorities referred to in the Court below the following cases were cited: *Rooke's Case* (2); *Reg.* v. *Cheltenham Paving Commissioners* (3); *Dimes* v. *Grand Junction Canal Co.* (4); *Reg.* v. *Meyer* (5); *Wildes* v. *Russell.* (6)

BRETT, M.R. I think that the better way of dealing with this case is to consider in the first place the validity of the two orders made by the commissioners. It seems to me that with regard to those two orders this dilemma arises. Either they were not adjudications of liability, and if so they ought not to stand in the way of the issue of a mandamus to make a rate to reimburse the prosecutor, or they were adjudications, and if so they ought to be set aside on the ground that they were made by interested parties. I agree with the decision of the Queen's Bench Division on that point. The question being whether the frontager or the whole of the level was liable to repair the damage caused by an extraordinary tide, it follows that, if any of the commissioners were owners of or interested in lands in the level, they were personally interested in the matter. This brings us to the main question, viz., whether the frontager was bound to pay for the repair of damages occasioned to the wall by an extraordinary storm and high tide. What the exact definition for this purpose of an extraordinary flood or tide ought to be it is perhaps not necessary to say, but I think it must be such a flood or tide as no reasonable person would anticipate. The arbitrator however has found the tide in this case to have been an extraordinary one. This question therefore arises, viz., whether, in the case of a level under the jurisdiction of a commission of sewers, the evidence being merely of a prescription by which the frontager is bound to maintain and repair the wall and no more, that prescription must be taken to be that he is bound to maintain and keep the wall in repair, not only as against damage done by ordinary tides, but also as against damage done by extraordinary tides? It seems to me that the proposition laid down in *Keighley's Case* (1), and adopted in *Rex* v. *Commissioners of Sewers for Somerset* (2), shews which way we ought to decide the present case. That proposition, as laid down by Lord Coke, is as follows: "If one is bound by prescription to repair a wall contra fluxum maris, and he keeps the wall in good repair, and of such height and as sufficient as it was accustomed, and by the sudden and unusual increase of water, salt or fresh, the walls are broken or the water overflows the walls, that in this case the Commissioners of Sewers ought to tax all such persons who hold any lands, &c., according to the quantity of their lands, &c., for no fault was in this case in him who ought to repair it." It seems to me that the effect of that proposition is that, where there is merely a prescription that lays on the frontagers the obligation to maintain and repair the wall, it applies to damages caused by the ordinary action of the sea, and the frontager, who has been guilty of no default, and who has kept the wall in a fit state to resist the ordinary action of the sea, is not bound to bear the expense of repairing damages caused by an extraordinary tide. That proposition was adopted in *Rex* v. *Commissioners of Sewers for Somerset.* (3) Then we come to the case of *Reg.* v.

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(1) The argument took place, by consent, as if the writ had actually issued.

(2) 5 Rep. 100.

(3) 1 Q. B. 467.

(4) 3 H. L. 759.

(5) 1 Q. B. D. 173.

(6) Law Rep. 1 C. P. 722, 739.

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(1) 10 Rep. 139.

(2) 8 T. R. 312.

(3) 8 T. R. 312.

Leigh. (1) The view of the judges in that case seems to have been that, though the ordinary inference to be drawn with regard to the liability of the frontagers is that it is confined to damages caused by ordinary floods or tides, yet the liability may be carried further, and it may be shewn by evidence that the prescriptive liability of the frontagers is to keep the wall in repair not only as against ordinary, but also as against extraordinary floods or tides. If that be so, the question before us is simply whether there is sufficient evidence in this case not only of the ordinary prescription but of a prescriptive liability of the more extensive character. [His Lordship proceeded to discuss the evidence set forth in the special case and appendix.] On the whole, I think that, though there might be some evidence for a jury of the exceptional liability contended for by the commissioners, there is not sufficient evidence to lead me to a conclusion contrary to that arrived at by the Divisional Court, and consequently that the exceptional liability is not proved. The prosecutor, therefore, was not liable to do at his own expense the repairs rendered necessary by this extraordinary storm and tide. The result is, that, in the absence of anything to the contrary, the whole level ought to bear the cost of these repairs. It has been suggested with regard to the repairs done in the first instance under the order of the marsh bailiff, that the prosecutor cannot recover the expense of doing them, because he was a mere volunteer. I do not think it necessary here to decide whether the frontager in the case of an extraordinary storm or tide may repair in the first instance and can afterwards get reimbursement from the level, because it seems to me that in this case there is evidence that what the prosecutor did he did by the request of the commissioners. The result is that the prosecutor is entitled to a mandamus to make a rate to reimburse him the whole amount which he claims.

BAGGALLAY, L.J. In this case, as it seems to me, in the result the only question is whether there is sufficient evidence to establish a liability on the part of the frontager beyond the ordinary liability which exists in accordance with the principles laid down, in *Keighley's Case* (1) and *Rex* v. *Commissioners of Sewers for Somerset.* (2) I cannot see any such evidence. It is consistent with the facts stated in the cases of repairs previously ordered to be done to the walls, which were relied upon on behalf of the commissioners, that the damages were in those cases occasioned and the repairs rendered necessary by the default of the frontagers in not keeping the walls in such a state of repair as to resist ordinary tides as they were bound to do. Here it is found by the case that the tide was an extraordinary one, and that the wall was in such a state of repair as to be fit to resist ordinary tides. With regard to the other question, viz., as to the orders made by the commissioners, I agree that if, as was held in the Court below, they are to be regarded as judicial decisions, they were invalid on the ground that some of the commissioners making them were interested, and therefore that the Court below was right in quashing them.

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(1) 10 A. & E. 398.

LINDLEY, L.J. I am of the same opinion. With regard to the two orders made by the commissioners, if they are to be regarded as judicial decisions, as the commissioners must contend, I think they ought to be quashed as having been made by a tribunal which ought not to have adjudicated. That being so, the main question only remains, viz., whether the prosecutor was liable at his own expense to repair the sea-wall, which had been destroyed by an extraordinary tide. There does appear to be in this case evidence that by reason of tenure or prescription the frontagers were bound to repair the sea-wall so as to keep out the sea, but the question is to what extent this liability goes. It was contended for the commissioners that it was an absolute and unlimited liability. The burden lies on the commissioners, as it seems to me, of establishing this extraordinary liability, and, though there may be on the case some evidence, in my opinion there is not sufficient evidence, to establish a liability on the part of the frontagers to keep the wall in repair under all circumstances and at any expense.

BRETT, M.R. I think that, where the term "negligence" is used in the judgment of the Divisional Court in this case, it

(1) 10 Rep. 139.

(2) 8 T. R. 312.

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THE QUEEN v. COMMISSIONERS OF SEWERS FOR ESSEX.

must mean default in keeping the wall in such repair as to be fit to withstand ordinary tides, not negligence in the ordinary meaning of the term.

Appeals dismissed.

Solicitors for prosecutor: *Thomson, Son, & Brooks.*

Solicitors for defendants: *Paterson, Snow, Bloxam, & Co., for Gepp & Son.*

E. L.

March 2.

THE QUEEN *v.* THE LICENSING JUSTICES OF MERTHYR TYDVIL.

Inn—Licence—Renewal—General Annual Licensing Meeting—Proceedings where no Notice of Opposition—Objection not made in open Court—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), s. 42.

By s. 42 of the Licensing Act, 1872, justices at the general annual licensing meeting shall not entertain any objection to the renewal of a licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal has been served upon the holder of the licence in the prescribed manner: "Provided that the justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given:"—

Held, that an objection to the renewal of a licence made privately to justices before they came into court at the general annual licensing meeting was not a good "objection made" within the meaning of the proviso to s. 42, and that, therefore, the justices had no power to adjourn the case.

RULE, obtained on behalf of Mary Meyrick, calling upon the licensing justices for the district of Merthyr Tydvil, in the county of Glamorgan, to shew cause why they should not, within a reasonable time, hold a further adjournment of the general annual licensing meeting held by adjournment on the 4th of October, 1884, and proceed to hear and determine the matter of an application for the renewal of a licence to sell beer to be consumed on or off the premises of an inn called the Red Lion, at Merthyr Tydvil.

The affidavits used on the argument of the rule disclosed the following facts:—

The applicant, Mary Meyrick, was the owner and occupier of the Red Lion, a house duly licensed for the sale of beer on the premises since the year 1869.

The licence had been duly renewed until the year 1884. At the general annual licensing meeting for the district of Merthyr Tydvil, held on the 6th of September, 1884, the applicant did not attend in person to obtain a renewal of her licence. On the morning of the meeting, before the justices came into court, the superintendent of police for the district objected before them to the renewal of the applicant's licence, on the grounds that the premises of the Red Lion were too small, and were not adapted to carrying on the business, and that the applicant had been convicted of an offence under the Licensing Acts. When the justices came into court the chairman stated that all the cases read out by the clerk would be adjourned, but that in all the other cases, in respect of which there was no conviction or complaint, the licences would be granted as before.

The clerk thereupon read out a list of houses (including the Red Lion) in respect of which the hearing of applications for renewal of licences was adjourned.

On the 12th of September the superintendent caused notice, dated the 8th of September, to be served on the applicant that he intended to oppose the renewal of her licence at the adjourned general annual licensing meeting to be held on the 27th of September. This notice stated the grounds of objection.

At the adjourned meeting on the 27th of September, the applicant was present; the hearing of the application was again adjourned till the 4th of October, and the applicant was told to attend on that date.

On the 4th of October the applicant attended the adjourned meeting. The justices heard some evidence with respect to the value of the house, and refused to grant a certificate for the renewal of the licence.

On the 29th of November, after the rule nisi had been obtained, the justices stated in writing to the applicant the grounds of their refusal.

B. F. Williams, for the justices, shewed cause. It is contended that the justices sufficiently complied with the requirements of the Licensing Act, 1872. (1) It is competent for the justices themselves to make objection within the proviso to sub-s. 2 of s. 42: *Reg.* v. *Farquhar* (2), and they must be taken to have done so here. The statute only requires that the applicant should have an opportunity of meeting the objection. By attending the first adjourned meeting the applicant waived the requirement of the justices to attend.

William Evans, for the applicant, supported the rule. The justices had no power to adjourn the hearing of the application at the general annual licensing meeting, because there was no objection made within the meaning of the proviso to sub-s. 2 of s. 42. The only objection was made by the superintendent of police, and founded upon evidence not given on oath as required by sub-s. 3.

[He was stopped.]

LORD COLERIDGE, C.J. I am of opinion that this rule must be made absolute. The form in which the mandamus should go does not seem to be material. It is immaterial whether the mandamus directs the justices to hear and determine afresh the application for a renewal of the licence, or directs them in terms to grant a renewal of the licence, because when the matter comes before the justices again they can only deal with it according to the provisions of the statute, and if no objection was made to the renewal at the first general annual licensing meeting, the justices may find that they had no jurisdiction to adjourn the hearing of the application, but were bound to grant a renewal.

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(1) By 35 & 36 Vict. c. 94, s. 42, "Where a licensed person applies for the renewal of his licence the following provisions shall have effect:

(1.) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend.

(2.) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given.

(3.) The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath.

Subject as aforesaid, licences shall be renewed and the powers and discretion of justices relative to such renewal shall be exercised as heretofore."

(2) Law Rep. 9 Q. B. 258.

I am of opinion that no objection was made within the proviso to sub-s. 2 of s. 42 of the Licensing Act, 1872, at the general annual licensing meeting, and therefore that the justices had no jurisdiction to adjourn the consideration of the application for a renewal of this licence. I agree that if the superintendent of police had made his objection in open court, it would have been a good objection within the statute. But no such objection was made. There was nothing more than a conversation between the superintendent and the justices in their private room behind the back of the applicant. I have in former cases expressed the opinion that nothing can be more irregular than for justices to hear the statement of the police before the case is heard in court. It is no answer to say that these gentlemen did in fact afterwards exercise an honest and independent judgment upon the matter before them. It is of great importance that a person subject to their jurisdiction should not have it in his power to say, "I have not been fairly treated, because my application was never publicly heard." I disapprove of and desire to discourage the practice. Justices ought to hear nothing but the case upon which they have to adjudicate, and especially they ought not to hear the private statement of one of the parties. I think that no objection was made within the meaning of the statute.

SMITH, J. I am also of opinion that this rule should be made absolute on the ground that no good objection to the renewal of the license was made within the meaning of the statute at the general annual licensing meeting. By s. 42 the justices cannot entertain any objection to the renewal of a licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to oppose such renewal has been served on the holder of the licence in the manner specified in the Act. Then the proviso to sub-s. 2 enacts that, although no such notice has been given, the justices may, on an objection being made, adjourn the granting of the licence to a future day. The case of *Reg.* v. *Farquhar* (1) would seem to shew that the objection mentioned in the proviso may be made by the justices themselves. I am of opinion that an objection made by any other person must, in order to give the justices power to adjourn, be made in open court. An objection made in the private room of the justices is not an objection made within the meaning of the Act. I think also that the justices, by hearing the statement of the superintendent of police to the effect that he objected to the renewal of the license, were receiving evidence not given on oath. (2)

Rule made absolute.

Solicitors for applicant: *Hacon & Turner, for W. Beddoe, Merthyr.*

Solicitors for justices: *Bell, Brodrick, & Gray, for Lewis & Jones, Merthyr.*

W. A.

March 4.

SNOW, APPELLANT; HILL, RESPONDENT.

Gaming—Betting—Place used for Betting, What is—16 & 17 *Vict. c.* 119, *ss.* 1, 3.

Dog-races were held in an inclosed field hired for the purpose by a committee, the public being admitted to a reserved portion of the field on payment of a small sum. The appellant attended the races, and moved about the reserved portion, making bets with various persons there:—

Held, that the appellant did not use a place for the purpose of betting with persons resorting thereto, within the meaning of ss. 1 and 3 of 16 & 17 Vict. c. 119, and therefore was not liable to be convicted for an offence under those sections.

CASE stated under 20 & 21 Vict. c. 43, by the stipendiary magistrate of the district of Stoke-upon-Trent.

The appellant was, on the 19th of August, 1884, convicted by the magistrate on an information laid by the respondent, a superintendent of police, charging that the appellant "being a

(1) Law Rep. 9 Q. B. 258.

(2) See *Reg.* v. *Justices of Birmingham* (40 J. P. 132).

person using a certain place, to wit, a field situated at West Brompton, in the parish of Wolstanton, in the county of Stafford, unlawfully did use the said place for the purpose of betting with persons resorting thereto upon certain events and contingencies of and relating to certain dog-races, contrary to the provisions of the statute 16 & 17 Vict. c. 119."

The following facts were proved before the magistrate, and stated in the case:—On the 7th of July, 1884, dog-races for prizes open for public competition after entries made by the owners of the dogs, were held in an inclosed field, about five acres in extent, in the parish of Wolstanton, which field had on a former occasion been used for a similar purpose. The ground had been let for hire for the purposes of the race meeting to a committee who carried out the arrangements for the racing, and the admission of the persons who resorted to the ground.

The public were admitted to one portion of the field (which was divided by a rope from that part of the field on which the races were run) on payment of an entrance fee of 6*d.* each to the gatekeeper, appointed by the committee.

The public had access also to another portion of the field, also divided by a rope from that part of the field on which the races were run, and forming one side of such field, of the length of about 100 yards, and about 7 yards in depth, on payment of an entrance fee of 1*s.* each to the gatekeeper. A great number of persons (many hundreds) were present at the race meeting, within both the reserved portions of the field, the appellant being in the latter.

The appellant was seen to receive from, and pay money to, persons with whom he had been heard to make bets. He had no particular location on the reserved space; but during the afternoon freely moved about in the reserved ground. He carried no umbrella; had no box, stool, or satchel, nor any distinctive mark, and did not exhibit his name.

The magistrate was of opinion that the case was governed by *Eastwood* v. *Miller* (1), and convicted the appellant in the penalty of 20*l.* and a sum for costs.

If the Court should be of opinion that the magistrate's decision was wrong, the conviction was to be quashed. If his decision was right, the case was to be remitted to him in order to enforce the conviction.

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(1) Law Rep. 9 Q. B. 440.

March 2. *John Rose*, for the appellant. It is contended that the appellant cannot be convicted of an offence under s. 3 of 16 & 17 Vict. c. 119 (1), because he did not use a place for the purpose of betting with persons resorting thereto, within the meaning of that Act. The appellant was not the owner or occupier of these grounds, and therefore the decisions in *Haig* v. *Corporation of Sheffield* (2), *Eastwood* v. *Miller* (3), and *Reg.* v. *Cook* (4) do not apply.

[LORD COLERIDGE, C.J. How do you distinguish *Eastwood* v. *Miller* (3)? Why is not the "place used" under s. 3 the same as the place owned or occupied?]

The answer is that the user must be ejusdem generis with ownership or occupation; otherwise the decisions in the cases of

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(1) By 16 & 17 Vict. c. 119, s. 1: "No house, office, room, or other place, shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same, or any person procured or employed by, or acting for or on behalf of such owner, occupier, or keeper, or person using the same, or of any person having the care or management, or in any manner conducting the business thereof, betting with persons resorting thereto; or for the purpose of any money or valuable thing being received by or on behalf of such owner, occupier, or keeper, or person as aforesaid, as or for the consideration of any assurance, undertaking, promise, or agreement, express or implied, to pay or give thereafter any money or valuable thing on any event or contingency of or relating to any horse race, or other race, fight, game, sport, or exercise, or as or for the consideration for securing the paying or giving by some other person of any money or valuable thing on any such event or contingency as aforesaid."

By s. 3: "Any person who being the owner or occupier of any house, office, room, or other place, or a person using the same, shall open, keep, or use the same for the purposes hereinbefore mentioned, or either of them, or any person who being the owner or occupier of any house, room, office, or other place, shall knowingly or wilfully permit the same to be opened, kept, or used by any other person for the purposes aforesaid, or either of them, or any person having the care or management of, or in any manner assisting in conducting the business of any house, office, room, or place opened, kept, or used for the purposes aforesaid or either of them, shall on summary conviction thereof before any two justices of the peace, be liable to forfeit and pay such penalty not exceeding 100*l.* as shall be adjudged by such justices."

(2) Law Rep. 10 Q. B. 102.

(3) Law Rep. 9 Q. B. 440.

(4) 13 Q. B. D. 377.

Doggett v. *Catterns* (1), *Shaw* v. *Morley* (2), *Bows* v. *Fenwick* (3), and *Gallaway* v. *Maries* (4) were unnecessary. The principle of all those cases is that there must be some place (defined by placing a box on the ground or sticking an umbrella into it, or the like) occupied or used by a person for the purpose of betting with persons resorting thereto.

The respondent did not appear.

Cur. adv. vult.

March 4. SMITH, J. This case was argued two days ago, before Lord Coleridge and myself, and I have now to deliver the judgment of the Court.

The question raised in the case stated by the magistrate, is whether the appellant could or could not be convicted under 16 & 17 Vict. c. 119, ss. 1, 3. The magistrate convicted him upon the authority of *Eastwood* v. *Miller*. (5) We are of opinion that the conviction cannot be affirmed.

The statute was passed for the purpose of preventing persons from keeping betting-houses or other places for the purpose of betting with persons resorting thereto. That is clear from the language of s. 1, which is: "no house, office, room, or other place shall be opened, kept, or used for the purpose of the owner, occupier, or keeper thereof, or any person using the same . . . . betting with persons resorting thereto." In order, therefore, to constitute an offence under the Act there must be some place occupied, kept, or used by the person sought to be convicted, for the purpose of betting with persons resorting thereto. The persons resorting thereto do not commit the offence aimed at by the Act. Thus in *Shaw* v. *Morley* (2) a kind of wooden shed was held to be an "office" and a "place" kept for the purpose of betting with persons resorting thereto within the meaning of the Act. So also in *Bows* v. *Fenwick* (3) was an umbrella stuck into the ground; and so in *Gallaway* v. *Maries* (4) was a wooden box placed on the ground. In *Eastwood* v. *Miller* (5) the occupier of some inclosed grounds, the whole of which he kept for the purpose of betting, was held liable to conviction for an offence against the statute. We think that the learned magistrate has taken a wrong view of the decision in *Eastwood* v. *Miller*. (1) Upon the facts found in the present case the appellant did not, we think, keep or use any place for the purpose of betting with persons resorting thereto. He was simply walking about the field, making bets with the other persons who were present, and we do not think that what he did comes within the purview of the Act.

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(1) 17 C. B. (N.S.) 669; 34 L. J. C. P. 159.

(2) Law Rep. 3 Ex. 137.

(3) Law Rep. 9 C. P. 339.

(4) 8 Q. B. D. 275.

(5) Law Rep. 9 Q. B. 440.

There will, therefore, be judgment for the appellant.

Judgment for the appellant.

Solicitors for appellant: *Purkis & Co., for A. B. D. Sword, Hanley.*

W. A.

March 13.

HOPKINSON *v.* CAUNT AND OTHERS.

Mine—Coal Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 76), *s.* 18—*Check-weigher, Appointment of—Qualification—Person "Employed in the Mine."*

By the Coal Mines Regulation Act, 1872, s. 18, the persons employed in a mine, and paid according to the weight of the mineral gotten by them, may, at their own cost, station a check-weigher at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by whom he is so stationed; and "the check-weigher shall be one of the persons employed either in the mine at which he is so stationed, or in another mine belonging to the owner of that mine."

The plaintiff, a check-weigher duly appointed under s. 18, received a fortnight's notice to quit his employment from the men employed in the mine. Before the notice expired, the men held a fresh election, at which the plaintiff (with others) presented himself as a candidate, and was again appointed:—

Held, that the true construction of s. 18 was to limit the class of persons from whom the men might appoint a check-weigher to persons employed in the mine by the mine-owner; that the plaintiff ceased to have any employment under the mine-owner when he was first appointed check-weigher by the men; and therefore that his second appointment was invalid.

ACTION in the Nottingham County Court.

The plaintiff in his particulars claimed 10*l.* damages for an assault committed by the defendants on the 15th of August, 1884.

The following facts were proved or admitted at the trial, and appeared on the county court judge's notes:—

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(1) Law Rep. 9 Q. B. 440.

On the 23rd of February, 1883, the plaintiff was appointed a check-weigher by and on behalf of the men employed in the Wollaton Colliery, in the county of Nottingham. It was admitted that at that date the plaintiff was a person "employed in the mine" by the Wollaton Colliery Company, and that he was duly appointed under the provisions of the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 18. (1) He continued to act as such check-weigher until the 30th of July, 1884, when he received notice to leave his employment in fourteen days. This notice was signed by the secretary to the check fund committee acting on behalf of the men employed in the mine, and the notice was given because the men intended to reduce the check-weigher's wages from 35*s.* to 30*s.* per week. The plaintiff was informed in the notice that he was eligible for re-appointment at the reduced rate of wages. On the 11th of August the men held an election for the office of check-weigher. Six candidates (including the plaintiff) presented themselves for election, and the plaintiff was again appointed check-weigher. The notice to leave given to the plaintiff expired on the 13th of August. On the morning of the 15th of August the plaintiff tried to enter the machine-house where the coals were weighed for the purpose of performing the duties of a check-weigher, but was forcibly prevented from entering the machine-house by the four defendants. It was admitted that the defendants, who were all men employed by the mine-owners, the Wollaton Colliery Company, and acting under their direct orders, used no more force than was necessary to prevent the plaintiff entering the machine-house.

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(1) 35 & 36 Vict. c. 76, s. 18, enacts: "The persons who are employed in a mine to which this Act applies, and are paid according to the weight of the mineral gotten by them, may, at their own cost, station a person (in this Act referred to as a 'check-weigher') at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by whom he is so stationed. The check-weigher shall be one of the persons employed either in the mine at which he is so stationed or in another mine belonging to the owner of that mine. He shall have every facility afforded to him to take a correct account of the weighing for the persons by whom he is so stationed; and if in any mine proper facilities are not afforded to the check-weigher as required by this section, the owner, agent, and manager of such mine shall each be guilty of an offence against this Act, unless he prove that he had taken all reasonable means, by enforcing to the best of his power the provisions of this section, to prevent such contravention or non-compliance.

"The check-weigher shall not be authorized in any way to impede or interrupt the working of the mine, or to interfere with the weighing, but shall be authorized only to take such account as aforesaid, and the absence of the check-weigher shall not be a reason for interrupting or delaying such weighing.

"If the owner, agent, or manager of the mine desire the removal of a check-weigher on the ground that such check-weigher has impeded or interrupted the working of the mine, or interfered with the weighing, or has otherwise misconducted himself, he may complain to any court of summary jurisdiction, who, if of opinion that the owner, agent, or manager shews sufficient primâ facie ground for the removal of such check-weigher, shall call upon the check-weigher to shew cause against his removal. On the hearing of the case, the Court shall hear the parties, and if they think that at the hearing sufficient ground is shewn by the owner, agent, or manager to justify the removal of the check-weigher, shall make a summary order for his removal, and the check-weigher shall thereupon be removed, but without prejudice to the stationing of another check-weigher in his place. The Court may in every case make such order as to the costs of the proceedings as they think fit."

Upon these facts the learned county court judge gave judgment for the plaintiff, and assessed the damages at 20*s.*

The defendants obtained a rule calling upon the plaintiff to shew cause why this judgment should not be set aside, and judgment entered for the defendants.

Atherley Jones, for the plaintiff, shewed cause. The plaintiff at the time of his re-appointment on the 11th of August, 1884, was employed in the mine within the meaning of s. 18 of the Coal Mines Regulation Act, 1872, and therefore was capable of being appointed check-weigher. His employment under the mine-owners was only suspended during the period in which he acted as check-weigher; it never entirely ceased. The object of the legislature was merely to ensure that the person appointed check-weigher should be a person known to the employers. To secure that object the Act makes it a condition precedent that he should be employed "in the mine," and by s. 72 "mine" includes all works and machinery both below ground and above ground. The plaintiff at the date of his re-appointment, therefore, had the qualification specified in the Act. It is contended that what occurred with respect to his re-appointment was, in substance, only a continuance of his former service at the reduced wages.

Sir Hardinge Giffard, Q.C. (*Appleton* with him), for the defendants, supported the rule. The plaintiff was not a person "employed in the mine" by the mine-owners at the date of his reappointment, and therefore was not capable of being appointed check-weigher. The legislature intended that the persons who were to appoint, should be the persons employed by the mine-owner to get the coal, and that the person elected should be one of their number, and so competent to weigh the coals on their behalf. When the Act of 1872 was passed there were no persons employed in the mine except those employed by the mine-owner. The Act makes it a condition precedent that the check-weigher should be selected from that body of men. When once a person has left the employment of the owner (as happened here when the plaintiff became check-weigher in 1883) it is within the mischief aimed at by the statute that he should be capable of being appointed check-weigher for the men; otherwise the effect would be to let in persons who were strangers to the mine-owners.

MATHEW, J. I am of opinion that the judgment of the county court judge should be reversed. His decision turned upon the construction of s. 18 of the Coal Mines Regulation Act, 1872. From the facts stated in the judge's note, it is impossible to come to any other conclusion than that the first appointment of the plaintiff as check-weigher was determined by the notice to leave, given to him by the men on the 30th of July, 1884, and that the election which took place on the 11th of August was a fresh election of a check-weigher on behalf of the men. The question is, did the plaintiff at the time of that fresh election continue to possess the qualification for election suggested by s. 18, which provides that the check-weigher shall be a person "employed either in the mine at which he is stationed, or in some other mine belonging to the owner of that mine?" Is a person employed by the men, and not by the mine-owner, within the meaning of those words? I am of opinion that he is not. I think that the word "employed" in s. 18 means "employed by the owner of the mine." No other class of persons than those employed by the owner was present to the mind of the legislature when the Act was passed; and it was thought reasonable that the check-weigher appointed by the men should be selected from that class. I entertain no doubt that the construction I have indicated is the true construction of the Act. It is clear to my mind that the plaintiff did not answer the description of a person employed by the owner of the mine, when he was reappointed a check-weigher. I therefore think that this rule must be made absolute to enter judgment for the defendants.

SMITH, J. I am of the same opinion. I think, on the true construction of s. 18, that a check-weigher at the time of his election by the men must be employed by the owner of the mine. I think it is clear that the plaintiff's employment by the mine-owner ceased when he was appointed check-weigher for the men in 1883, and he then entered upon a new employment, which was an employment by the men. Upon the facts, the contention for the plaintiff that his employment by the mine owners was never discontinued cannot be maintained. I am also of opinion that he entered upon a new contract of service by virtue of the election held by the men on the 11th of August, 1884. This rule must, therefore, be made absolute.

Rule absolute. Leave to appeal was refused.

Solicitor for plaintiff: *J. W. Hickin, for W. J. Clegg & Sons, Sheffield.*

Solicitors for defendants: *Taylor, Hoare, Taylor & Box, for Hunt & Williams, Nottingham.*

W. A.

[IN THE COURT OF APPEAL.]

1885
Jan. 23.

Ex parte KOSTER. In re PARK.

Bankruptcy—Judgment Summons—Committal—Order to pay Debt by Instalments—" Means to pay"—Money arising from Gift—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5, *sub-s.* 2.

Per Cotton and Lindley, L.JJ.:—

For the purpose of determining whether a judgment debtor has had "the means to pay" the judgment debt, with the view of making an order for his committal under sub-s. 2 of s. 5 of the Debtors Act, 1869, money derived from a gift may be taken into account. It is not necessary that the "means to pay" should have been derived from the debtor's earnings, or from a fixed income.

Appeal from the refusal of Cave, J., to commit a judgment debtor for non-compliance with an order made on a judgment summons.

On the 30th of October, 1883, judgment was recovered in an action brought in the Queen's Bench Division by Robert Koster against James Allan Park for 125*l.* 1*s.* 8*d.* debt and 3*l.* 14*s.* costs. The amount not having been paid, the plaintiff served a judgment summons on the defendant, and on the 17th of December, 1883, an order was made that the defendant should pay the amount of the debt and costs by monthly instalments of 5*l.*, the first payment to be made on the 1st of January, 1884. The defendant made no payment in compliance with this order, and on the 3rd of April, 1884, four monthly instalments being unpaid, the plaintiff served him with a summons, calling on him to appear personally to be examined on oath touching the means which he had, or had had since the date of the order, for payment of the instalments, and to shew cause why he should not be committed to prison for his default.

On the 20th of May, 1884, Mathew, J., made an order on this summons for the committal of the defendant, but directed that the order should not be drawn up if the defendant paid 10*l.* in a month and 2*l.* a month afterwards. The defendant did not pay the 10*l.* within a month, and the order for his committal was drawn up, and on the 12th of July he was arrested and lodged in Holloway Gaol. On the 17th of July he paid the 20*l.* and costs, and was released. He paid no further monthly instalments, and on the 10th of September, five instalments of 5*l.* each being due from him, the plaintiff served him with another judgment summons. The defendant was examined, and he admitted that since his arrest in July he had had the sum of 60*l.* in his possession. This sum was derived from an allowance of 5*l.* per week which was made to him by his brother as a voluntary gift. He had been in receipt of the allowance for some years. Cave, J., refused to make an order of committal. There was no note of the reasons given by the learned judge for his decision, but the appellant's counsel stated that he expressed an opinion that, as the allowance made by the brother to the debtor was purely voluntary, the debtor had not, within the meaning of s. 5, sub-s. 2 (1) of the Debtors Act, 1869, had "the means to pay" the instalments.

The plaintiff appealed.

F. Cooper Willis, for the appellant. The evidence shews that the respondent had had the means to pay the instalments. It is immaterial from what source the money which he has had in his possession was derived.

[Brett, M.R. The object of the application is to put a screw on the brother.]

Credit was given by the appellant to the respondent on the faith of his then having an allowance from his brother, which had been paid to him for many years. The object of the application is, not to obtain a prospective order for payment of the debt out of the allowance, but to punish the debtor for not having paid the instalments when he had the means of doing so in his possession. When the order for committal was made on the previous occasion he paid at once.

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(1) Sect. 5 provides that "Subject to the provisions hereinafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of that or any other competent Court.

"Provided (inter alia)

"(2) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has or has had since the date of the order or judgment the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same."

The Respondent in person. A bankruptcy notice was served on me, and I could not, consistently with the claims of my other creditors, pay the instalments.

BRETT, M.R. I will only say that the appellant has not satisfied me that Cave, J., was wrong in saying that it had not been shewn that the debtor had had the means of paying the instalments.

COTTON, L.J. We do not really know what the rule laid down by Cave, J., was. In my view sub-s. 2 applies if the debtor has had from any source whatever "the means to pay" the debt. I think it would be wrong to say that it does not apply if the means of paying have been derived from a gift. But I do not dissent from the view entertained by the other members of the Court that there is not sufficient evidence that the respondent has had the means of paying the debt.

LINDLEY, L.J. It appears to me utterly immaterial how the debtor obtained the means of paying the debt—whether he obtained it by gift, or charity, or in any other way. But all we know is that the debtor has had an allowance of 5*l.* a week from his brother; it does not, in the absence of fuller information as to his position, follow that he has had the means of paying the debt.

Solicitor for appellant: *W. F. Stokes.*

W. L. C.

1885
Jan. 23.

[IN THE COURT OF APPEAL.]

Ex parte WHITE. In re WHITE.

Bankruptcy—Discharge of Bankrupt—Condition—Contracting Debt without reasonable or probable Ground of Expectation of being able to pay it—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 28, *sub-s.* 3 (*c*).

Two partners, who had no capital of their own, commenced business by means of borrowed money, assigning to the lender as security their leasehold premises, the goodwill of their business, and all their existing and after-acquired stock-in-trade, fixtures, furniture, and book-debts, giving him power to take possession at any time. They contracted debts in carrying on the business, and became bankrupts. The mortgagee took possession under his deed, and his security was insufficient. The registrar granted the bankrupts a discharge, on condition of their consenting to judgment being entered up against them by the trustee for the whole of the debts provable in the bankruptcy:—

Held, that the bankrupts had contracted debts without having at the time of contracting them any reasonable or probable ground of expectation of being able to pay them, and that the registrar's decision was right.

Appeal from an order of Mr. Registrar Pepys, granting to the bankrupts a conditional order of discharge.

Walter White and E. G. Winter carried on in partnership the business of upholsterers, house painters, and decorators. When they commenced business they had no capital, and they borrowed 3000*l.* for the purposes of their business from A. O. Bayly. The money was lent on the terms of its repayment, together with such a sum in lieu of interest as should be equal to two-fifths of the net profits of the business, being secured by a mortgage of the leasehold premises of the borrowers and their fixtures, stock-in-trade, &c. By the mortgage deed, dated the 21st of August, 1880, the mortgagors covenanted with the mortgagee to repay the 3000*l.* on demand by him, his executors, administrators, or assigns. And also, until he should demand the repayment of the 3000*l.*, or (not being sooner than ten years from the date of the deed) the mortgagors should voluntarily pay off the same, to pay to the mortgagee such a sum in lieu of interest on the 3000*l.* as should be equal to two-fifths of the net profits of the business. And the mortgagors demised to the mortgagee their leasehold premises for the unexpired residue of the term for which they held them (wanting the last day thereof), subject to redemption as therein mentioned. And they also assigned to the mortgagee all the machinery, plant, fixtures, effects and things then affixed to, or which were in or about the leasehold premises, and all the stock-in-trade, furniture, articles, effects, or things on the premises then belonging to the mortgagors, or either of them, in respect of the business, or used in or belonging to the same in the place where the same was carried on, or in any other place or places whatsoever; and all the beneficial interest and goodwill of the mortgagors, or either of them, of, in, or concerning their business; and also all the book and other debts then due or owing or belonging to the mortgagors, or either of them, on account of, or in connection with their business; and also all the book and other debts which might at any time or times thereinafter during the continuance of the security be due or owing or belonging to the mortgagors, or either of them, on account of or in connection with their business, To have and to hold the same unto the mortgagee, subject to the provision for redemption thereinafter contained. And it was thereby declared that all the stock-in-trade, fixtures, furniture, goods, wares, merchandize, articles, effects, and things which should during the continuance of the security be brought on the leasehold premises, or should be in any other place or places in the actual or constructive possession of the mortgagors, or either of them, on account of or in connection with the business, should be included in the security, and be subject to the provisions thereof, in the same manner as if the same had been in existence at the date of the deed and assured thereby, and although the same or any part thereof might not be capable of passing by law by the assignment thereinbefore contained. And it was agreed and declared that it should be lawful for the mortgagee at any time, so long as any principal or other money should remain due or owing on the security of the mortgage, to take possession of and hold and enjoy all and singular the premises thereinbefore expressed to be thereby demised and assigned for the purposes of the security, but that until possession should be so taken the demised and assigned premises should remain in the possession of the mortgagors. The mortgagors also covenanted that they would not, so long as any money should

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Ex parte White. In re White.

be owing on the security of the deed, without the previous consent of the mortgagee, remove the premises thereinbefore expressed to be thereby assigned, or any of them, from the leasehold premises, or any other premises wherein the same should be for the time being, except when any of them, being fixtures, furniture, or things of a like nature, should be removed for necessary repairs or worn out, or, being goods, wares, or merchandize, should have previously been bonâ fide sold, and the price paid or to be paid therefor properly entered in the books of account of the business, and would replace such of the premises thereby assigned, being fixtures, furniture, or things of a like nature, as should be worn out by other articles of the same or like kind, at least equal to the present value of the articles worn out. There was also a power of sale given to the mortgagee at any time after default in payment of any principal or other sum of money intended to be secured by the deed.

On the 28th of April, 1884, the mortgagors were adjudicated bankrupts, and on the 27th of May, 1884, a trustee of their property was appointed. In June, 1884, the mortgagee sold the stock-in-trade and effects on the bankrupts' premises. He also took possession of the leasehold premises and the other mortgaged property. The debt due to him in respect of principal money and share of profits in lieu of interest, exceeded the value of the mortgaged property.

The registrar granted the bankrupts an order of discharge, on condition of their consenting to judgment being entered up against them for the whole amount of the debts provable in the bankruptcy. The bankrupts appealed.

Stanley Boulter, for the appellants. The only reason why the bankrupts have no assets is that Bayly has seized everything. The effect of the registrar's order will be that they can never go into business again; they will not be able to obtain any credit. They could have paid every one in full but for Bayly's action; he has destroyed their business. The consequence of the decision must be that no trader who has given a bill of sale of his stock-in-trade can safely incur any debts.

[Brett, M.R. That may be so if the bill of sale includes the

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EX PARTE WHITE.
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goodwill of the trader's business and all his property present and future.]

Herbert Reed, for the trustee;

Muir Mackenzie, for the official receiver;

Winslow, Q.C., and *Frank Evans*, for Bayly; were not called upon.

BRETT, M.R. It seems to me that the judgment of the registrar was right. The bankrupts entered into business without any capital of their own, and in order to carry on the business they borrowed money, and they gave to the lender of the money a mortgage which enabled him at any moment to seize the whole of their stock-in-trade and plant and other property employed in the business, not only that which existed at the date of the deed, but that which they might acquire at any future time. They contracted debts in the course of their business, and the question is whether they contracted those debts without having at the time of contracting them any reasonable or probable ground of expectation of being able to pay them. No reasonable man could have failed to see that, when they had executed such a deed, if they should get into difficulties in their business the first thing which the mortgagee would do would be to seize all the property and stop the business. I agree with the registrar's decision, and with the reasons which he gave for it.

COTTON, L.J. I agree. In my opinion, when the bankrupts entered into business, after giving a mortgage of all their property present and future, they contracted the debts which they contracted in their business without reasonable or probable ground of expectation of being able to pay them.

LINDLEY, L.J. I am of the same opinion. Of course, if the bankrupts have any surplus assets the judgment will be got rid of.

Muir Mackenzie asked that the official receiver's costs of the appeal might be allowed out of the bankrupts' estate. He was served with notice of the appeal.

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Ex parte White. In re White.

The Court refused the application.

Cotton, L.J. We do not wish to encourage the official receiver in appearing except when it is necessary that he should do so.

Solicitors for trustee: *Thomson, Son, & Brook.*
Solicitor for official receiver: *W. W. Aldridge.*
Solicitors for mortgagee: *Combs, Bayly, & Henley.*

W. L. C.

Jan. 30.

[IN THE COURT OF APPEAL.]

Ex parte BONHAM. In re TOLLEMACHE.

Bankruptcy—Proof—Judgment Debt—Evidence.

When in support of a claim to prove a debt in a bankruptcy the only evidence of the debt is a judgment, and that judgment has been obtained after the act of bankruptcy, the judgment debt cannot be proved.

Appeal from the refusal of Mr. Registrar Pepys to admit a proof in the bankruptcy of the Hon. W. L. F. Tollemache, commonly called Lord Huntingtower.

The fiat was issued against the bankrupt on the 2nd of September, 1842, upon an act of bankruptcy which was completed on the 2nd of August, 1842. The bankrupt died on the 21st of December, 1872. By the death of his father, the Earl of Dysart, in 1878, a reversionary interest of considerable value, which had been vested in the bankrupt, fell into possession and became available for the payment of his creditors. The proof was tendered by Mrs. Bonham, the widow and executrix of George Bonham, who died on the 26th of April, 1874. By her affidavit of proof she said that the bankrupt was at and before the date and issuing of the fiat, as she verily believed, indebted to her husband, and that the bankrupt's estate was, as she verily believed, still indebted to her as her husband's executrix in the sum of £500, being the damages recovered by him in the Court of Queen's Bench on the 21st of August, 1842, in an action on the case upon promises, upon the promissory note of the bankrupt indorsed by

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EX PARTE BONHAM.
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him, for which promissory note her husband, as she verily believed, gave to the bankrupt the full amount in money, less the discount, before the same became due. As evidence of the judgment a copy of an entry in the entry book of judgments in the Court of Queen's Bench for 1842 was produced, the copy being produced from the Public Record Office and certified by the assistant keeper of the records. Mrs. Bonham was examined and cross-examined before the registrar, and she admitted that she had no personal knowledge of the claim. The registrar rejected the claim, on the ground that the evidence was insufficient.

The executrix appealed.

Cooper Willis, Q.C., and *Sidney Woolf,* for the appellant. Though the judgment was recovered after the act of bankruptcy, the appellant is entitled to prove in respect of it: *Ex parte Helm.* (1) The judgment is not treated as creating an entirely new debt, but only as giving a security for the old debt: *Ex parte Bryant.* (2) If the debt would be barred by the bankrupt's certificate, it must be provable in the bankruptcy.

Winslow, Q.C., and *Yate Lee,* for the assignees, were not heard.

BRETT, M.R. I am prepared to lay this down, that when the only evidence of a debt is a judgment, and the judgment has been recovered after the act of bankruptcy, the judgment debt cannot be proved in the bankruptcy.

COTTON and LINDLEY, L.JJ., concurred. (3)

Solicitor for appellant: *J. R. Chidley.*
Solicitors for assignees: *Still & Son.*

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(1) Mont. & Mac. 70.

(2) 1 V. & B. 211, 214.

(3) See next case.

W. L. C.

1885
Feb. 13.

[IN THE COURT OF APPEAL.]

Ex parte ANDERSON. In re TOLLEMACHE.

Bankruptcy—Proof of Debt—Judgment Debt—Proof of Consideration—Evidence of Judgment.

When a claim is made to prove in a bankruptcy in respect of a judgment debt, though the judgment is primâ facie evidence of the debt, it is not conclusive evidence, and, if the circumstances are suspicious, the Court will call upon the claimant to prove the consideration for the judgment, and if he is unable to prove it, by reason of the loss of documents, or the lapse of time or otherwise, the proof will be rejected.

A judgment may be proved by the production of a duly certified copy of an entry in the entry-book of judgments of the Court in which the judgment was recovered.

Appeal from an order of Mr. Registrar Pepys, rejecting a proof tendered by Mrs. Anderson in the bankruptcy of the Hon. W. L. F. Tollemache, commonly called Lord Huntingtower.

The fiat in bankruptcy was issued on the 2nd of September, 1842, upon an act of bankruptcy which was completed on the 2nd of August, 1842. The bankrupt had attained the age of twenty-one on the 4th of July, 1841. He died on the 21st of December, 1872. His father, the Earl of Dysart, died in 1878, and thereupon some reversionary interests of the bankrupt fell into possession, and became available for the payment of the creditors in the bankruptcy, but the realization was delayed for some time in consequence of some legal proceedings. There had been at first practically no assets for distribution in the bankruptcy. The reversionary interests had been mentioned by the bankrupt in his statement of his affairs made at the commencement of the proceedings in the bankruptcy, in which he stated that a negotiation had been going on with some members of his family for the purchase of those interests for 25,000*l*.

On the 25th of October, 1884, a proof was tendered by Mrs. Anderson, the executrix of James Hall, who died on the 24th of October, 1870. By her affidavit she said that the bankrupt was at and before the date of the fiat indebted to Hall, and his estate was, as she believed, still indebted to her, as executrix of Hall, in the sum of 561*l.* 6*s.* 8*d.*, for damages recovered by Hall in the Court of Exchequer, on the 4th of January, 1842, against the bankrupt in an action on the case, and also in the further sum of 18*l.* 13*s.* 4*d.*, interest on the judgment debt until the date of the fiat.

An examined copy, certified by an assistant-keeper of the public records, of the entry of the judgment in the entry-book of judgments in the Court of Exchequer, of Michaelmas Term, 1841, was produced. The entry was as follows:—

"Michaelmas Term, 1841 (5th Vict.)

"Judgments, Interlocutory and Final; Entries of Satisfaction and Process, &c., and Inrolments of Deeds.

"January 4th.

"London proms. order B. Parke	James Hall against the Honourable William Lionel Felix Tollemache, commonly called Lord Huntingtower. Damages 561*l.* 6*s.* 8*d.* Costs "	Carlon & Haynes.

The judgment itself could not be found, nor could the acceptance or promissory note of the bankrupt on which it was founded. The executrix knew nothing about the matter. Hall himself had never tendered any proof during his lifetime.

Mr. Haynes, who had been the solicitor of Hall in the year 1842, was examined, and he stated that in that year Hall obtained a judgment against the bankrupt. He believed the action was founded on a bill of exchange accepted by the bankrupt. He had made several searches among the papers in his office, but had been unable to find either the judgment or the bill. He had no recollection of the bill of exchange, or of the circumstances under which it was obtained. He had no doubt that he obtained the judgment.

The registrar held that there was not sufficient proof of a debt and rejected the proof.

The executrix appealed.

Jan. 30. *Cooper Willis, Q.C.*, and *Sidney Woolf*, for the appellant. A judgment is evidence of a debt existing at the time when it was obtained; the Court cannot go behind a judgment unless something is shewn to justify an investigation into the consideration. The onus of proof is on those who allege that there was no consideration. It is not enough to say that the judgment was recovered a great many years ago. The judgment is good until the contrary is shewn: *Ex parte Bryant.* (1)

[Brett, M.R. referred to *Ex parte Revell* (No. 1) (2).]

In that case Baggallay, L.J., said (3): "I am disposed to think that primâ facie a judgment ought to be considered as binding. But, if a proper case is made, I think the Court ought to direct an inquiry into the consideration for a judgment debt." In *Ex parte Kibble* (4) it was proved that there was no valid debt, because the debtor was an infant at the time when it was contracted. In the present case there is no evidence that the bill was accepted when the bankrupt was under age. In *Ex parte Revell* (2) the Court acted on something which happened antecedently to the judgment.

Winslow, Q.C., and *Yate Lee*, for the assignees. In bankruptcy a judgment is not primâ facie proof of a debt; the consideration must be proved: *Ex parte Williamson* (5); *Ex parte Bryant* (1). There is no sufficient reason shewn for not proving the debt at the commencement of the bankruptcy proceedings; the property which has lately fallen into possession was mentioned in the bankrupt's statement of affairs, and it was known that in the course of time his estate would be able to pay a dividend. In fact, a number of debts were proved at first. The practice in bankruptcy has always been in proving a judgment debt to state the consideration, and not to rely only on the judgment. The claimant must always prove the consideration for a bill of exchange or that he is a holder for value. The delay in proving is of itself enough to throw the onus of proving the consideration now on the creditor. *Ex parte Revell* (2) shews that the appellant can stand in no better position than her testator would have stood if he had proved at first, and the non-production of the bill would have been a suspicious circumstance. The proper evidence of a judgment is an office copy of it: Cooke's Bankrupt Laws, 8th ed. vol. i. p. 153.

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(1) 1 V. & B. 211; 1 Rose, 288.

(2) 13 Q. B. D. 720.

(3) 13 Q. B. D. at p. 724.

(4) Law Rep. 10 Ch. 373.

(5) 1 Atk. 82.

Cooper Willis, Q.C., in reply. The proof is in the form of proof on a judgment given in Cooke's Bankrupt Laws, 8th ed., vol. ii., p. 33. The onus is on the person who alleges that there was no consideration for a judgment debt: *Ex parte Ritso.* (1)

Cur. adv. vult.

Feb. 13. Brett, M.R. The question is whether the registrar was right in refusing to admit a proof of a judgment debt. Evidence was given by means of an entry in the entry-book of judgments in the Court of Exchequer of Michaelmas Term, 1841, that a judgment had been then recovered by the claimant's testator against the bankrupt. The entry in the book is as short as could well be, and it was made more than forty years ago. There is no other evidence of the judgment. But the entry shews that the judgment was recovered in respect of an acceptance or a promissory note given by the bankrupt, and the dates shew that it was recovered not many months after he came of age. We felt some doubt at first whether a certified copy of this entry was proper evidence of a judgment. But upon inquiry we find that this was the proper mode of proving a judgment. The original record would have been handed back to the party who obtained the judgment, and at one time he or his solicitor must have had it in his hands. It was suggested by Mr. Winslow that, if a person who claims to prove in bankruptcy on a judgment debt gives no evidence of the debt but the judgment, his proof ought to be at once rejected; in other words, that the production of a judgment is in bankruptcy no evidence of a judgment debt at all, but that the claimant must prove the consideration for the debt. I cannot go that length, or say that, if there are no circumstances of suspicion, a judgment is no evidence of a judgment debt. It seems to me that it is as good evidence of a debt as possible. But it was argued on the other hand by Mr. Cooper Willis, that a judgment must stand as good evidence of a debt, unless the trustee in the bankruptcy can prove that no consideration was given for the debt. I cannot go that length. It seems to me that a judgment is primâ facie evidence of a provable debt; but that, if there are circumstances which cast suspicion on the judgment, or on the debt on which it was founded, the Court has a right to call upon the claimant to prove the consideration for the debt. It would be wrong to call upon the trustee to prove that there was no consideration; he cannot have the means of doing so. Are there, then, circumstances of suspicion in the present case? It seems to me that there are. The fact that the judgment was obtained very soon after the bankrupt came of age upon a promissory note or acceptance is, I think, sufficient to entitle the Court to call on the claimant to prove more than she has proved. She says that the judgment and the bill or note are lost. If they are lost this is her misfortune; it is not to be wondered at after the lapse of forty years. On the ground that there are circumstances of suspicion in the case, and that the claimant has totally failed to prove the consideration for the debt, I think the registrar's decision was right.

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(1) 22 Ch. D. 529, 532.

Cotton, L.J. I am of the same opinion. The judgment was recovered on the 4th of January, 1842; the bankruptcy took place on the 2nd of September, 1842. Nothing had been done in the interval to enforce the judgment. The bankrupt lived for thirty years afterwards, and the judgment creditor lived till 1870. It was not till some years after the death of the bankrupt that any proceedings were taken to prove the debt in the bankruptcy. It is said that it was supposed that there would never be assets to pay the creditors. But, though the reversionary interests have only recently fallen in, they were mentioned in the bankrupt's statement of affairs, and he stated that some of his relatives had proposed to give 25,000*l.* for them. I agree that we cannot disregard a judgment if there are no circumstances of suspicion. A judgment is primâ facie evidence of a debt. But in bankruptcy the Court can always go behind a judgment, if no consideration has been given for it, and for this reason, that in bankruptcy the Court must consider the rights of the other creditors of the bankrupt. A judgment may be submitted to by a defendant without any ground, but this ought not to prejudice the right of his creditors, if he becomes bankrupt, to dispute the judgment. In the present case there is a great deal to throw suspicion on the judgment, and no explanation has been given. In my opinion the proof was properly rejected. The testator did not in his lifetime think fit to come forward to prove, and now, by reason of the deaths of parties, the necessary evidence cannot be procured.

My brother Lindley, who heard the argument, but who is unable to be present to-day, has requested me to say that, without expressing exactly the same reasons, he concurs in our conclusion. (1)

Solicitor for claimant: *J. R. Chidley.*

Solicitors for assignees: *Still & Son.*

W. L. C.

[IN THE COURT OF APPEAL.]

Feb. 6.

Ex parte DEVER. In re SUSE. (No. 2.)

Bankruptcy—Bill of Exchange—Specific Appropriation of Remittances—Judicial Insolvency of Drawer and Acceptor—Application of Remittances remaining in Specie—Rule in Ex parte Waring (19 Ves. 345).

Bankers in London granted to merchants in Ceylon a letter of credit, authorizing the merchants to draw on them at three four, or six months sight, for any sums not exceeding 10,000*l.* at one time, the drafts to be covered within two, three, or five months (according as they had been issued at three, four, or six months), by remittances on good London houses. And the bankers thereby agreed with the merchants, and also, as a separate engagement, with the bonâ fide holders respectively of the bills, that the bills should be duly accepted on presentation, and paid at maturity. The course of dealing between the parties was this—if the remittances sent as cover for the merchants' drafts matured later than the drafts accepted, interest was debited by the bankers against the merchants from the date of the maturity of the acceptances to that of the maturity of the remittances, while, if the remittances matured earlier than the acceptances, interest was credited to the merchants. In all cases the bankers dealt with the remittances as they thought expedient, and the proceeds were paid into the general banking account of their firm. Under this letter of credit a number of bills were drawn by the merchants on the bankers, and were accepted by them, and other bills were remitted by the merchants to cover the acceptances, the letters which accompanied the remittances always describing them as sent to cover particular drafts which were specified in the letters. The bankers stopped payment and filed a liquidation petition, under which a trustee was afterwards appointed. In consequence of their stoppage the merchants also stopped payment. At the date of the liquidation petition acceptances under the letter of credit to the amount of 11,535*l.* were outstanding, to meet which the bankers had received from the merchants remittances to the amount of 3009*l.*, of which two bills remained in specie in the hands of the bankers, the others having been converted by them into cash. After the filing of the petition two other bills, which had been posted by the merchants before they knew of the stoppage of the bankers, came into the hands of the receiver appointed under the petition. The merchants' firm consisted of two partners, one of whom was insane, and resident in Germany. The sane partner procured an adjudication of insolvency against himself in Ceylon, and under this insolvency an assignee was appointed. The sane partner deposed that "under this insolvency my estate, and also the estate of my firm, so far as legally can be, is now being administered," and this evidence was not contradicted:—

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(1) See last case.

Held, that the joint estate of the merchants, as well as that of the bankers, was under a forced administration, and that consequently the rule in *Ex parte Waring* (19 Ves. 345) applied.

Held, therefore, that the proceeds of the four remitted bills which were in specie at the commencement of the liquidation must be applied, not in paying the whole of the acceptances rateably, nor in paying rateably all those acceptances to meet which remittances had been sent before the filing of the liquidation petition, but in paying those acceptances to meet which the four bills had been appropriated by the letters with which they were sent.

When remittances are sent under such circumstances to cover drafts of the remitter accepted by the remittee, the remittee may, so long as he is solvent, be entitled, by mercantile usage or the course of dealing between the parties, to deal with the remittances as he pleases; but, so soon as he becomes insolvent, the remitter is entitled to insist on having the remittances applied in paying the acceptances, and that right is the foundation of the rule in *Ex parte Waring* (19 Ves. 345), but the right extends only to those remittances which remain in specie at the date of the insolvency.

Appeal from an order of Mr. Registrar Pepys that the proceeds of certain bills of exchange, which were in the hands of the trustee in the liquidation of Messrs. Suse & Sibeth, should be applied by him in the payment of certain other bills of exchange which had been accepted by the liquidating debtors.

Suse & Sibeth were merchants and bankers, carrying on business in the city of London. Messrs. Fryer, Schultze, & Co. were merchants carrying on business at Colombo, in Ceylon. On the 15th of September, 1882, Suse & Sibeth sent to Fryer, Schultze, & Co., at their request, a letter of credit (No. 809) in the following terms:—

"We hereby authorize you to draw on us at three, four, or six months sight, for any sums not exceeding 10,000*l.* at one time, such draft or drafts to be covered within two, three, or five months (according as they have been issued at three, four, or six months), by your remittances on good London houses, with bills of lading, and invoices of the produce to which such remittances refer, attached. This credit resumes its original force as soon as your drafts have been covered in the manner described above. And we hereby agree with you, and also as a separate engagement with the bonâ fide holders respectively of the bills drawn in complance with the terms of this credit, that the same shall be duly accepted on presentation, and paid at maturity, if drawn or negotiated up to the 1st of September, 1883."

An affidavit made by C. J. Sibeth, one of the partners in the firm of Suse & Sibeth, contained the following statements:—

"In accordance with the course of dealing between the respective firms of Suse & Sibeth and Fryer, Schultze, & Co., acceptance commission was payable to Suse & Sibeth upon all drafts drawn upon and accepted by them under the letter of credit, and where, as was generally the case, the remittances sent as cover for the drafts matured later than the drafts accepted, interest was debited by Suse & Sibeth against Fryer, Schultze, & Co., from the date of maturity of the acceptances to that of the maturity of the remittances, while in the converse case, where the remittances matured earlier than the acceptances, interest was credited to Fryer, Schultze, & Co., and Suse & Sibeth in all cases dealt with the remittances as they thought most expedient, and the proceeds were paid into the general banking account of the firm. Under the terms of the letter of credit Fryer, Schultze, & Co. would be at liberty, after having covered their drafts drawn thereunder in the way provided for by the letter of credit, to draw another 10,000*l.* to be covered in like manner, such a credit being known in the mercantile world by the name of a 'revolving credit.'"

On the 4th of October, 1883, Suse & Sibeth stopped payment, and on the 9th of October they filed a liquidation petition, under which H. Dever was appointed receiver of their estate and manager of their business. The creditors afterwards resolved on a liquidation by arrangement and appointed Dever trustee.

At the date of the filing of the petition Suse & Sibeth had under the letter of credit accepted for the accommodation of Fryer, Schultze, & Co. drafts to the amount of 11,535*l.*, all of which were then still current, and against these drafts Suse & Sibeth had received from Fryer, Schultze, & Co. in cash or bills remittances amounting to 3009*l.* 15*s.* 8*d.*, of which only two bills, respectively for 255*l.* 4*s.* 2*d.* and 640*l.* 14*s.* 1*d.*, dated respectively the 11th of August and the 5th of September, 1883, remained unconverted at the date of the filing of the petition. Between the appointment of Dever as receiver and manager and his appointment as trustee he received a bill for 768*l.* 18*s.* and another bill for 762*l.* 10*s.* which had been respectively remitted by Fryer, Schultze, & Co., to Suse & Sibeth as cover under the letter of credit. Three of the bills drawn by Fryer, Schultze, & Co. upon Suse & Sibeth and accepted by them under the letter of credit were respectively for 1000*l.*, 1850*l.*, and 950*l.*, numbered respectively 753, 772, and 778, and which became due respectively on the 2nd of November, the 5th of November, and the 26th of November, 1883. The bills for 1000*l.* and 1850*l.* were held for value by the Chartered Mercantile Bank, and the bill for 950*l.* was held for value by the Comptoir d'Escompte de Paris. N. D. Schultze, one of the partners in Fryer, Schultze, & Co., deposed that up to the 11th of August, 1883, his firm had duly provided Suse & Sibbeth with all the cover which they were entitled up to that date to receive in respect of the bills drawn on them, and which cover had included part cover for the bill for 1850*l.* On the 11th of August, 1883, Fryer, Schultze, & Co. wrote to Suse & Sibeth as follows:—

"Inclosed we beg to hand you

No. 813. 672*l.* 2*s.* 3*d.*, 3 m/s of Marseilles } payable
No. 814. 255*l.* 4*s.* 2*d.*, „ „ } London.

in further cover of our draft, No. 772, for 1850*l.* We also inclose B/L for 200 bags native coffee, to be delivered against payment of draft No. 813, and B/L for 50 bales cinnamon to be delivered against payment of our draft No. 814."

The documents mentioned in this letter were duly received by Suse & Sibeth.

On the 5th of September, 1883, Fryer, Schultze, & Co., wrote to Suse & Sibeth as follows:—

"Inclosed we beg to remit our draft No. 824, 640*l.* 14*s.* 1*d.* at 3 m/s on J. B. Bastide & Fils., Marseilles, payable London, with B/L for 200 bags native coffee, per Yangtse, which is to be delivered against payment of our above draft. Please to apply 150*l.* in final cover of our draft No. 772 for 1850*l.*, and the balance of 490*l.* 14*s.* 1*d.* in part cover of our draft No. 753 for 1000*l.*"

The documents mentioned in this letter were duly received by Suse & Sibeth.

On the 18th of September, 1883, Fryer, Schultze, & Co., wrote to Suse & Sibeth, as follows:—

"Inclosed we beg to remit our draft No. 837 for 768*l.* 15*s.*, 3 m/s of Kleinwort, Cohen, & Co., with B/L of 200 bales cinnamon per *Clan Grant* to be delivered against acceptance. Please to apply 530*l.* out of this draft as final cover for our draft No. 753 for 1000*l.* (due 26th November), and the balance (238*l.* 15*s.*) as part cover for No. 778 for 950*l.* due same date."

The documents mentioned in this letter were received by the receiver and manager after the filing of the liquidation petition.

On the 28th of September, 1883, Fryer, Schultze, & Co., wrote to Suse & Sibeth as follows:—

"We beg to remit inclosed our draft No. 842 for 762*l.* 10*s.*, 3 m/s of Messrs. Tesdorff & Co., in final cover of our draft No. 778 for 950*l.* due 26th November. We also inclose B/L for 200 bales cinnamon, to be delivered against acceptance of our draft."

The documents mentioned in this letter were received by the receiver and manager after the filing of the petition. The proceeds of these four remitted bills, for 255*l.* 4*s.* 2*d.*, 640*l.* 14*s.* 1*d.*, 768*l.* 15*s.*, and 762*l.* 10*s.*, respectively, were received by the trustee in the liquidation.

In consequence of the stoppage of Suse & Sibeth, Fryer, Schultze, & Co. also stopped payment. The latter firm consisted of two partners, N. D. Schultze and W. D. Schultze. W. D. Schultze was of unsound mind, and had been for some years resident in Germany, and prior to the suspension of the firm the

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business had been carried on under a power of attorney granted for that purpose by W. D. Schultze prior to his incapacity of mind. N. D. Schultze deposed as follows: "Acting upon the requirement of the creditors of my firm, and with a view to securing as far as possible the winding up of our affairs by the Court, I, in the month of November, 1883, procured myself to be duly adjudicated insolvent by the District Court of Colombo, in Ceylon, the Court within the jurisdiction of which my firm carried on business, and under this insolvency R. L. M. Browne has been duly appointed, and is now, the assignee, and my estate, and also the estate of my firm, so far as legally can be, is now being administered and wound up." This evidence was not contradicted.

The registrar, on the application of the Chartered Mercantile Bank, and the Comptoir d'Escompte, made an order declaring that the proceeds of the four remitted bills for 255*l.* 4*s.* 2*d.*, 640*l.* 14*s.* 1*d.*, 768*l.* 15*s.*, and 762*l.* 10*s.*, were specifically applicable to the payment of the three bills held by the Chartered Mercantile Bank and the Comptoir d'Escompte, and ordered that the proceeds should be applied by the trustee as follows: viz., the proceeds of the bill for 255*l.* 4*s.* 2*d.*, and 150*l.*, part of the proceeds of the bill for 640*l.* 14*s.* 1*d.*, to the payment of the bill No. 772 for 1850*l.*; 490*l.* 14*s.* 1*d.*, the balance of the proceeds of the bill for 640*l.* 14*s.* 1*d.*, 530*l.*, part of the proceeds of the bill for 768*l.* 15*s.*, to the payment of the bill No. 753 for 1000*l.*; and 238*l.* 15*s.*, the balance of the proceeds of the bill for 768*l.* 15*s.*, and the proceeds of the bill for 762*l.* 10*s.* to the payment of the bill No. 778 for 950*l.*

The registrar held that the remitted bills had been specifically appropriated to the payment of the particular acceptances which they were sent to cover, and that the joint estate of Fryer, Schultze, & Co., as well as that of Suse & Sibeth, was insolvent and under a forced administration, and that, consequently, *Ex parte Waring* (1) applied. The trustee of Suse & Sibeth appealed.

Cohen, Q.C., and *Sidney Woolf*, for the appellant. The rule in *Ex parte Waring* (1) does not apply, for the remittances were

(1) 19 Ves. 345.

not impressed with any trust in the hands of the acceptors; they were merely sent to keep them out of cash advances. The course of dealing shews that the acceptors were entitled to deal with the remittances in any way they pleased, and the way in which interest was credited and debited by the acceptors points to the same conclusion. The acceptors had a right to hold the remittances as security against the whole of their acceptances under the letter of credit, and all the holders of acceptances have proved against their estate, except the present respondents. The registrar's order entitles the respondents to be paid in full. Their claim is not, and could not be, founded on any contract; it is founded entirely on the rule in *Ex parte Waring* (1); but for that rule their only right would be to prove on the acceptances which they hold. In *Royal Bank of Scotland* v. *Commercial Bank of Scotland* (2) the House of Lords held that the rule in *Ex parte Waring* (1) does not do full justice to the estate of the acceptor in a case in which (as in the present case) the security is not sufficient to cover the whole amount of the acceptances, and they refused to apply the rule to such a case in a Scotch bankruptcy. That decision amounted to an overruling of *Powles* v. *Hargreaves.* (3) At any rate the rule in *Ex parte Waring* (1) applies only either when the property in the remittances is in the remitter, or when, if it is in the remittee, it is impressed with a trust for application in a particular way. In the present case the property in the remittances was at the date of the bankruptcy in the acceptors free from any trust; the mode in which interest was credited and debited shews that they were entitled to use the remittances as their own property. The remittances became their property as soon as they were posted to them, i.e., before the bankruptcy. If the remittances were impressed with a trust, so must also their proceeds if they can be traced. But the acceptors could not, so long as they were solvent, have been restrained from using the proceeds of the remittances in any way they pleased. The rule in *Ex parte Waring* (1) is founded on the fact that the remitter is entitled to insist on having the security applied in payment of the acceptances: *Powles* v. *Hargreaves* (3); *In re*

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(1) 19 Ves. 345.

(2) 7 App. Cas. 366.

(3) 3 D. M. & G. 430.

Barned's Banking Co. (1). The charging of interest shews that the remitter is entitled to make use of the remittances for his own purposes, and consequently that there is no trust: *In re Gothenburg Commercial Co.* (2); *Ex parte Broad.* (3)

It may be that the drawers would be entitled to have the remittances back on their paying all the acceptances: *Ex parte Dever* (4); *Tooke* v. *Hollingworth* (5); but does it follow that the rule in *Ex parte Waring* (6) applies, there being no duty to apply the proceeds of particular remittances to the payment of particular acceptances? The mere fact that on the stoppage of the acceptors the property in the remittances would revert to the drawers, on their retiring the acceptances, is not sufficient to make the rule in *Ex parte Waring* (6) apply; they have not retired the acceptances. The Court will not now extend the application of the rule, which is an unjust rule, as was pointed out by the House of Lords in *Royal Bank of Scotland* v. *Commercial Bank of Scotland.* (7)

At any rate, the registrar's order is wrong, in not directing that the proceeds of the remitted bills should be applied rateably in paying all the acceptances under the letter of credit. The acceptors had a general lien on, or right to be indemnified out of, all the remittances against all the acceptances, at any rate in the case of insolvency: *Ex parte Gomez* (8); and the rights of the holders of the acceptances depend entirely on those of the drawers and acceptors.

The other point is that the rule in *Ex parte Waring* (6) applies only where there is a double judicial insolvency; insolvency per se is not sufficient. No doubt the estate of Suse & Sibeth is under a judicial administration, but it is not proved that the joint estate of Fryer, Schultze, & Co. is being so administered.

Winslow, Q.C., and *A. C. Nicoll*, for the Chartered Mercantile Bank and the Comptoir d'Escompte.

[Brett, M.R. You need only deal with the question of the administration of the joint estate of Fryer & Co. and the question whether the proceeds of the remittances ought to be applied in paying all the acceptances rateably.]

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(1) Law Rep. 19 Eq. 1.
(2) 29 W. R. 358.
(3) 13 Q. B. D. 740.
(4) 13 Q. B. D. 766.
(5) 5 T. R. 215.
(6) 19 Ves. 345.
(7) 7 App. Cas. 366.
(8) Law Rep. 10 Ch. 639.

The affidavit of Mr. Schultze shews that the joint estate of his firm is being administered in Ceylon. The bankruptcy of one partner puts an end to the partnership, and the trustee becomes a tenant in common of the assets with the other partner, and he has a right to see that they are applied in paying the debts of the firm, and this is his duty, and the joint assets would be distributed in that bankruptcy, even in the absence of the solvent partner: *Barker* v. *Goodair*. (1)

[They were stopped by the Court on this point.]

As to the other point, the letter of credit and the subsequent correspondence and course of dealing shew that each draft was to have a separate cover allotted to it. The acceptors could not alter the appropriation directed by the drawers.

[COTTON, L.J. Could the drawers take any of the remittances out of the hands of the acceptors without relieving them of all their liability under the letter of credit? Is not the appropriation made by the other letters made only for the purpose of shewing that the remittances were sent under the letter of credit?]

The acceptors would not be entitled to retain a surplus from the cover sent for one bill in order to cover another bill which they had accepted, but for which the drawers were not as yet, under the terms of the letter of credit, bound to send cover. The agreement really was that cover should be sent for each acceptance, and the cover so sent could not be used as cover for any other acceptance, and a remittance which was sent as cover for two specified acceptances could not be used as cover for a third. Up to the time of the stoppage of Suse & Sibeth, Fryer, Schultze, & Co. had sent them all the cover to which they were entitled. When that stoppage took place Fryer, Schultze, & Co. were also compelled to stop, and then, of course, they could send no more cover. The stoppage of Suse & Sibeth took place while the letter of the 7th of September was on its way to England. The trustee of Suse & Sibeth could not have prevented Fryer, Schultze, & Co. from insisting on having the remittances inclosed in that letter applied to the purpose for which they were sent.

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(1) 11 Ves. 78.

[Brett, M.R. It is admitted that the holders of the acceptances have no personal equity; ought the Court of Bankruptcy to give the respondents a preference over the other holders of acceptances who are in the same position as they are?]

If the remittances had been sent as a general security for all the acceptances under the letter of credit, all the holders of acceptances under it would be entitled to share in the proceeds of the remittances: *City Bank* v. *Luckie* (1); but the remittances were not in the present case sent as a general security.

Brabant, for the trustee in the Ceylon insolvency.

Cohen, Q.C., in reply. *In re Gothenburg Commercial Co.* (2) is a clear authority that the drawers could not after the bankruptcy of the acceptors have reclaimed the remittances without retiring all the acceptances.

Brett, M.R. I decline to discuss how it was that the rule in *Ex parte Waring* (3) came to be laid down, or to consider whether it is a good or a bad rule: whether it is good or bad, just or unjust, it exists, and the effect of it seems to be accurately stated by Mr. A. C. Eddis in his treatise on the rule.

He states the rule thus (p. 5): "Where, as between the drawer and the acceptor of a bill of exchange, a security has, by virtue of a contract between them, been specifically appropriated to meet that bill at maturity, and has been lodged for that purpose by the drawer with the acceptor; then, if both drawer and acceptor become insolvent, and their estates are brought under a forced administration, the bill-holder, though neither party nor privy to the contract, is entitled to have the specifically appropriated security applied in or towards payment of the bill."

The question is whether the applicants in the present case have brought themselves within this rule? There was plainly a drawer and an acceptor of each of the bills in question. Was there a security which, by virtue of a contract between the drawer and the acceptor, was specifically appropriated to meet each of the bills at maturity? That depends upon the construction of the letter of credit. The letter of credit says that the draft or drafts

(1) Law Rep. 5 Ch. 773.

(2) 29 W. R. 358.

(3) 19 Ves. 345.

drawn under it are "to be covered within two, three, or five months (according as they have been issued at three, four, or six months) by your remittances on good London houses." Under that provision, a draft issued at three months is to be covered by a remittance sent forward within two months, and so on. It seems to me that it would be impossible more clearly and conclusively to divide the remittances, and make each remittance applicable to the payment of the draft to cover which it is sent forward. It would be impossible to make a remittance sent to cover a draft issued at three months a cover for a draft issued at four months. Each remittance is to be cover for the bill to cover which it is sent forward. And the last clause of the letter of credit also seems to shew that each draft was to be a separate transaction: "We hereby agree with you, and also, as a separate engagement, with the bonâ fide holders respectively of the bills drawn in compliance with the terms of this credit," to accept the bills and to pay them at maturity. If they can legally make such a contract in this way, it is a separate contract with the holder of each draft. The subsequent letters of the drawers cannot, of course, alter the contract, but they afford an inference that the remittances were sent forward in accordance with the contract as the parties understood it. The result is that, "by virtue of a contract between the drawer and the acceptor, a security has been specifically appropriated to meet each acceptance, and it has been lodged by the drawer with the acceptor." It is clear that the estate of the acceptors is being administered under a forced administration. It has been disputed whether the drawers' estate is also under a forced administration, but the evidence which has been given as to the facts and the law of Colombo, seems to me to shew that the partnership estate of the drawers is under a forced administration at Colombo. That being so, "the bill holders," i.e., the applicants in the present case, "though neither parties nor privies to the contract, are entitled to have the specifically appropriated security," i.e., the remittances which were sent forward for the purpose, "applied in or towards payment of the bills" which they hold. The case is brought within the express terms of the rule as stated by Mr. Eddis, and which, I think, are a true enunciation of the rule in *Ex parte Waring.* (1)

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(1) 19 Ves. 345.

But it is said that in the present case the state of things is altered by reason of the way in which interest was credited and debited, and *In re Gothenburg Commercial Co.* (1), is cited as an authority for that proposition. I think the true meaning of that decision is this,—if the person to whom the securities are sent does use the proceeds for his own purposes, and credits the sender with interest upon the amount of the proceeds, and the sender does not object, then, so far as the securities are thus used, they are taken out of the rule in *Ex parte Waring* (2), because to that extent the security is gone. But, though some of the securities may have been thus taken out of the rule, yet with regard to those which have not been so treated, but which remain in specie at the date of the bankruptcy, the rule in *Ex parte Waring* (2) applies, and this in accordance with the latter part of the judgment in *In re Gothenburg Commercial Co.* (1)

Then it is said that the securities were sent to cover the whole of the bills drawn under the letter of credit. If that were so, the rule in *Ex parte Waring* (2) would still apply, but it would apply in favour of all the holders of acceptances. But I think that is not so, because, on the true construction of the letter of credit, the remittances were sent to cover *respectively* the acceptances as cover for which they were sent forward.

Another point raised is whether the Court ought not to deal with the existing securities for the benefit of all the holders of the acceptances to cover which remittances have been sent. Those persons, however, who have not got a security specifically appropriated to meet the acceptances which they hold, are not within the rule. If, rightly or wrongly, any of the securities have been realized by the debtors, in that case there is no security to which the rule in *Ex parte Waring* (2) can apply. But that is no reason why the holders of other acceptances, the securities for which are still in existence, should not have the benefit of the rule. I think, therefore, that the decision of the registrar was right.

COTTON, L.J. I am of the same opinion. I will deal first with the last objection, that the estate of the drawers and the acceptors of the bills are not both being judicially administered, one of the partners in the drawers' firm being solvent, and residing in Germany. I think that difficulty has been satisfactorily explained. The partner who is resident in Germany is of unsound mind, and the business of the partnership has been carried on under a power of attorney which was given when he was of sound mind, and the affidavit of the other partner states that the joint estate is, so far as the law will allow, being administered under the insolvency in Ceylon, and this is not contradicted. I think we must take it that the joint estate is being administered just as it would be under similar circumstances in England.

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(1) 29 W. R. 358.

(2) 19 Ves. 345.

Then what is the rule in *Ex parte Waring?* (1) It is very well stated by Mr. Eddis in his book, but I think what he says may lead to a little misapprehension, because it might be inferred that the rule would not apply unless there had been an appropriation of a security to meet a particular bill. In my opinion, if there has been a general appropriation of securities to meet the bills drawn by A. upon B., the securities must be applied in accordance with the rule in *Ex parte Waring.* (1) As I understand the principle of the rule it is this—the Court finds in the hands of a bankrupt certain property, which has been remitted to him by another person also become bankrupt to secure him against a liability which he has undertaken upon bills drawn on him by that person. The property cannot be applied in paying the general creditors of the acceptor, because it was in his hands impressed with a trust; nor can it go to pay the general creditors of the drawer, because he was not entitled to have it back without meeting the acceptances. The Court thereupon applies the property in such a way as will carry out as far as possible the equities between the two estates, i.e., in paying the acceptances to cover which it was sent. The rule assumes that the property which is in the hands of the acceptor is not his own absolute property; if it was, it would go to pay his creditors generally. The first objection taken in the present case is, that no trust was impressed on the remittances, because, if there had been a trust, it could be enforced as against the proceeds of any of the remitted bills which have been already converted into money and which can be traced. That is not quite correct. The question is

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whether in the events which have happened—at the moment of the bankruptcy—the bankrupt was entitled to apply the remitted bills which were then in his hands to any purpose he pleased. It may well be that, so long as he is solvent, the holder of remittances made to him in this way is, by mercantile usage or the course of dealing between the parties, entitled to apply the proceeds of the remittances for his own benefit in any way he pleases. But that does not shew that, at the moment when he can no longer meet his acceptances, the remitted bills, if they remain in specie, are not subject to any equity in favour of the drawer of the bankrupt's acceptances, enabling him to require them to be applied in meeting the acceptances. If the drawer were solvent he would be entitled to say, "You must hand the remitted bills back to me upon my retiring the acceptances." Independently of this consideration, it is clear to my mind, upon the construction of the contract between the parties in the present case, that the remittances were not intended to be dealt with by the acceptors in any way they might think fit, but that they were sent for the purpose of meeting the acceptances and of enabling the acceptors to meet them. I think, therefore, that the rule in *Ex parte Waring* (1) ought to be applied as regards those remittances which remained in specie at the commencement of the bankruptcy of the acceptors, so as to carry out the equities between their estate and the estate of the drawers.

Then there arises this point, which, so far as I know, is a novel one. At the time of the bankruptcy there were remittances to the amount of nearly 900*l.* in specie in the hands of the acceptors, and other remittances to the amount of about 1500*l.* were afterwards received by the trustee, but the time had not arrived when, according to the terms of the letter of credit, remittances ought to have been sent to cover other acceptances of the bankrupts. The question is whether the remittances which are in specie ought to be applied in payment of the particular acceptances which they were sent to cover, or in part payment of all the holders of acceptances under the letter of credit. Now it is admitted that the holders of the acceptances have no equity of their own, and yet it is contended that the remittances ought to be applied in paying all those persons who have claims against the estate of both the drawers and the acceptors in respect of bills drawn under the letter of credit. I think that would be inventing a new equity. At the time of the bankruptcy the acceptors had no right against the drawers in respect of those acceptances to meet which the time had not arrived for sending remittances. I think, therefore, that the remittances which are in specie cannot be applied in paying all the acceptances. Ought they then to be applied in paying only those acceptances to cover which they were remitted, or in payment also of those acceptances in respect of which remittances had been made but had disappeared before the bankruptcy? I think that the payment ought to be limited to the former class of acceptances. I am not sure that it is strictly right to say that there was a specific appropriation of the remittances to the payment of the particular acceptances, because that would look as if the holders of the acceptances had an equity of their own to have them so applied. I think the result of the letters of the drawers to the acceptors is that there was only an appropriation of the remittances to particular acceptances as between themselves. But I think it would be wrong to require the drawers to provide again for those acceptances the liability on which had already been provided for by remittances. In my opinion, therefore, the equity ought to be applied only in favour of the holders of those acceptances to meet which the remittances had been sent.

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Lindley, L.J. I also think that the registrar's order is right. As to the point that the drawers' firm is solvent, the facts are a little peculiar. One of the partners is a lunatic, and the joint estate is being wound up on the petition of the other partner. I think that is quite right under the circumstances, and that a similar proceeding would be adopted in this country if one of the partners in a firm was a lunatic and resident abroad. I think, therefore, that there is a double insolvency under a forced administration.

Then we have to deal with certain remittances which are in specie, and not with the proceeds of other remittances which were converted into cash by the acceptors before the bankruptcy. If the remittances which are in specie had been converted into cash before the bankruptcy, the bankrupts might have dealt with the proceeds as they pleased; but it does not, therefore, follow that, if they are not converted into cash, they are not to be treated as specifically appropriated. Having regard to the terms of the letter of credit and the course of dealing between the parties, these remittances were as much specifically appropriated as in any of the cases in which the question of specific appropriation has ever arisen. They were specifically appropriated to protect the acceptors from liability on the particular acceptances in respect of which they were sent. This gets rid of the argument upon the application of *Ex parte Waring.* (1)

The third point is a little more troublesome. There were acceptances under the letter of credit to the amount of over 11,000*l.*, and remittances were made to the amount of over 4500*l.* The question is, whether the remittances which are in specie ought to be applied rateably in paying all the acceptances, or only in paying the particular acceptances to meet which those remittances were sent. The only safe way is to look at the rights of the drawers at the time of the bankruptcy. We must take the rule in *Ex parte Waring* (1) as it is, and it seems to me that it depends on the right of the drawers. Could the drawers have insisted on having the remittances applied in taking up the particular acceptances, or could the acceptors have insisted on applying them to the payment of all the acceptances? I think the true view is, that the drawers could have insisted on the application of the remittances to the particular acceptances. No doubt the result will be that some of the holders of acceptances will be paid in full, but I think that is generally the result of the rule in *Ex parte Waring.* (1)

Appeal dismissed with costs.

Brabant asked for the costs of the trustee of Fryer, Schultze, & Co.

The Court allowed costs to the amount of 2*l.* 2*s.*

Solicitors for appellant: *Roberts & Barlow.*

Solicitors for respondents: *Clarke, Rawlins & Co.*

W. L. C.

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(1) 19 Ves. 345.

[IN THE COURT OF APPEAL.]

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Feb. 13.

Ex parte MOORE. In re FAITHFULL.

Bankruptcy—Bankruptcy Notice—Final Judgment—Judgment for Costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).

At the trial of an action in the Chancery Division, upon motion for judgment in default of pleading, judgment was given ordering and adjudging that the defendant should be perpetually restrained from practising as a solicitor at Liverpool or otherwise in violation of his covenant with the plaintiff. And the Court declared that the partnership between the plaintiff and the defendant ought to be dissolved as from the date of the plaintiff's notice, and ordered and decreed the same accordingly. And it was ordered that an inquiry should be made what was the amount of the damages which the plaintiff had sustained by reason of the defendant's breach of covenant, and that the defendant should, within fourteen days from the date of the chief clerk's certificate, pay the amount of the damages, when certified, to the plaintiff. And it was ordered that the defendant should pay to the plaintiff his taxed costs of the action. The costs were taxed and were partly paid by the defendant. The inquiry as to damages was not prosecuted:—

Held, that the order for the payment of costs was a "final judgment" within the meaning of s. 4, sub-s. 1 (*g*) of the Bankruptcy Act, 1883, and that the plaintiff was entitled to serve the defendant with a bankruptcy notice for the unpaid balance of costs.

Ex parte Chinery (12 Q. B. D. 342) explained.

Appeal from an order of Mr. Registrar Brougham setting aside a bankruptcy notice.

R. B. Moore and R. C. Faithfull were both solicitors. On the 14th of July, 1882, they entered into articles of partnership for a term of five years from the 1st of October, 1882. The articles provided (inter alia) that Faithfull should devote his whole time to the business, and should not at any time during the partnership term engage in any business on his own account without the previous consent of Moore. It was also agreed that Faithfull should not at any time thereafter, without the previous consent in writing of Moore, either during the continuance of the term or within ten years after the determination thereof, whether such determination should be by effluxion of time or from any other cause, either directly or indirectly practise as a solicitor on his own account, or in partnership with any other person either in Birkenhead or in Liverpool, or within ten miles of either of those places. Power was given to Moore (inter alia) in case Faithfull should commit any breach of any of the partnership articles, to determine the partnership by notice. The parties carried on business in partnership at Birkenhead up to July, 1883. In that month Faithfull, without the knowledge or consent of Moore, entered into an arrangement with J. N. Isaac, a solicitor at Liverpool, for carrying on business with him in partnership at that place. On the 16th of July, 1883, Moore commenced an action in the Chancery Division against Faithfull and Isaac, claiming by his writ an injunction to restrain Faithfull from carrying on the business of a solicitor in partnership with Isaac in Liverpool, or within ten miles thereof, and from otherwise carrying on such business in breach of his covenant contained in the partnership articles; damages to be paid by Faithfull for his breach of the covenant; and the costs of the action. The plaintiff also claimed some relief against Isaac. On the 6th of August, 1883, the plaintiff obtained an interlocutory injunction against Faithfull until judgment in the action. On the 24th of August, 1883, the plaintiff gave notice in writing to Faithfull to determine the partnership. On the 30th of October, 1883, the plaintiff delivered a statement of claim by which, in addition to the relief claimed by the writ, he claimed dissolution according to the terms of the articles of partnership; and accounts and inquiries. Neither of the defendants delivered a statement of defence. On the 17th of November, 1883, the action came on for trial before Chitty, J., on a motion by the plaintiff for judgment in default of pleading by the defendants, and judgment was given to the following effect: This Court doth order and adjudge that the defendant Faithfull be perpetually restrained from carrying on the business of a solicitor in partnershsp with the defendant Isaac, in Liverpool or within ten miles thereof, and from otherwise practising or carrying on such business in violation of the covenant contained in the articles of partnership. And, the defendant Isaac, by his counsel, undertaking not to issue any circular stating that he is carrying on business in Liverpool in partnership with the defendant Faithfull, and not to otherwise represent that the defendant Faithfull is carrying on business in Liverpool in violation of the covenant contained in the articles, this Court doth declare that the partnership between the plaintiff and the defendant Faithfull ought to stand and be dissolved as from the 24th of August, 1883, and doth order and decree the same accordingly. And it is ordered that an inquiry be made what is the amount of damages which the plaintiff has sustained by reason of the breach of covenant by the defendant Faithfull. And it is ordered that the defendant Faithfull do, within fourteen days from the date of the chief clerk's certificate, pay to the plaintiff the amount of such damages when ascertained and certified. And it is ordered that the defendants do pay to the plaintiff his costs of the application for the restraining order of the 6th of August, 1883, and the costs of the action, except that as to the costs of the action the defendant Isaac is only to pay such part of the general costs of the action as relate to the injunction sought against him, such costs to be taxed and certified by the Taxing Master. On the 23rd of January, 1884, the Taxing Master made his certificate, by which he taxed the costs payable by Faithfull by virtue of the judgment at £73 9*s.* 8*d.* Faithfull paid the plaintiff 20*l.* on account of this amount. The inquiry as to damages was at the date of the issuing of the bankruptcy notice still pending, it not having been prosecuted. On the 18th of December, 1884, Moore served on Faithfull a bankruptcy notice for £53 9*s.* 8*d.*, the unpaid balance of the £73 9*s.* 8*d.*, describing it in the notice as the amount of the balance due on a final judgment obtained by him against Faithfull in the Chancery Division on the 17th of November, 1883.

Faithfull applied to the Court to set aside the bankruptcy notice, and in his affidavit in support of the application he said that he had a counter-claim for 200*l.* against Moore in respect of his share of the profits of the partnership with Moore, and that he could not have set up the counter-claim in the action in which the judgment was obtained against him. In answer to this affidavit, Moore deposed that there was nothing due from him to Faithfull in respect of his share of the profits, but that, on the contrary, Faithfull overdrew from the partnership, and there was a balance due from him to Moore in respect of the overdrawal, and that he was also liable to Moore in damages under the judgment.

The registrar set aside the bankruptcy notice, on the ground that the judgment of the 17th of November, 1883, was not a final judgment within the meaning of sub-s. 1 (*g*) of s. 4 of the Bankruptcy Act, 1883, inasmuch as there was still something to be done under it, viz., the assessment of damages; and that, having regard to what was said by Cotton, L.J., in *Ex parte Chinery* (1), no previously existing liability of Faithfull to Moore was established by the judgment as regarded the costs.

Moore appealed.

Romer, *Q.C.*, and *F. Cooper Willis*, for the appellant. The registrar was wrong in holding that the order for the payment of costs was not a final judgment. It formed part of a judgment which was clearly final, and, though the damages had to be ascertained by inquiry, nothing further remained to be done by the Court. The registrar misapprehended the effect of *Ex parte Chinery*. (1) He took it to be a decision that a bankruptcy notice cannot be issued except by a person who is a creditor of the debtor antecedently to the judgment. That case was very different from the present. In *Duke of Beaufort* v. *Phillips* (2) it was held that a decree for specific performance, with a reference to the master to compute interest and tax costs, and an order that the defendant should pay the purchase-money and interest and costs, when ascertained, constituted a judgment debt.

The other cases on this section, *Ex parte Schmitz* (3); *Ex parte Whinney* (4), are distinguishable.

Another point suggested was that the debtor had a counter-claim against the appellant for an amount which exceeded the sum claimed by the bankruptcy notice. The counter-claim alleged was for a balance which would be found due to him on taking the partnership accounts; it might have been set up in the action, but it was not set up.

Herbert Reed, for the debtor. If this order for payment of costs is a final judgment at all, it is not a final judgment within the meaning of sub-s. 1 (*g*) of s. 4. The judgment consists of two parts; the Court "orders and adjudges" or "decrees" certain things, and then afterwards it "orders" the defendant to pay the costs.

(1) 12 Q. B. D. 342.

(2) 1 De G. & S. 321.

(3) 12 Q. B. D. 509.

(4) 13 Q. B. D. 476.

[Earl of Selborne, L.C. If it is a judgment for one purpose it must be a judgment for the other; the only question is as to its finality.]

At Common Law there might be an interlocutory judgment directing the assessment of damages, and the Court might adjudge that the plaintiff do recover his costs from the defendant.

[Brett, M.R. In that case no judgment would be signed.]

In the taxing master's certificate in this case he says that he has taxed the costs "in pursuance of *the order* of the Court." The direction for an inquiry as to damages is not a final judgment.

[Earl of Selborne, L.C. It goes on to order payment by the defendant of the amount which shall be found due; the plaintiff would not have to come back to the Court.]

If it was found that there were no damages, the defendant would have to apply to the Court for the costs of the inquiry.

[Earl of Selborne, L.C. I think that, if the costs of the inquiry are not reserved by the judgment, an application could not be made to the Court for those costs.]

Under the garnishee clauses of the Common Law Procedure Act, it was always held that an "order" was a different thing from a "judgment"; an order dismissing an action with costs for want of prosecution could not be enforced by means of an attachment of a debt: *Cremetti* v. *Crom* (1); nor could an order of a Court of Equity for the payment of money: *In re Price.* (2) In *Bailey* v. *Bailey* (3) it was held that an order to sign final judgment under Order XIV., r. 1, cannot be made when the action is for arrears of alimony pendente lite, payable under an order of the Divorce Division.

At any rate, this order is not a "final judgment" within sub-s. 1 (*g*) of s. 4; for that purpose the judgment must have been obtained by a "creditor;" there must have been a previously existing debt due from the defendant.

[Earl of Selborne, L.C. The bankruptcy notice requires the payment of a judgment debt; the person who issues it must be a creditor at the time when he applies for leave to issue it.

(1) 4 Q. B. D. 225.

(2) Law Rep. 4 C. P. 155.

(3) 13 Q. B. D. 855.

Brett, M.R. Your construction would exclude a judgment for a tort.]

That is the result of what was said by Cotton, L.J., in *Ex parte Chinery* (1), and in *Ex parte Whinney* (2) Cave, J., said (3), "Is it not implied in sub-s. 1 (*g*) that the person who may issue a bankruptcy notice must be a creditor before he obtains the judgment?"

[Earl of Selborne, L.C. With great respect to Cave, J., it would take a great deal of argument to convince me that he was right in that view.]

As to the counter-claim, it could not have been set up against the order for payment of costs.

Earl of Selborne, L.C. It seems to me perfectly plain that this sum of 53*l.* 9*s.* 8*d.* was due to the appellant under a final judgment. To constitute an order a final judgment nothing more is necessary than that there should be a proper litis contestatio, and a final adjudication between the parties to it on the merits. That this order was a judgment is plain, and it is equally plain that it was final. Nothing further remains but the question, whether the fact of there being in the same judgment a direction for an inquiry as to damages, in respect of which the judgment was not final until the amount of the damages was ascertained—whether that fact makes any difference as to the finality of the remainder of the judgment. It appears to me that this can make no difference when the right of the plaintiff to this amount of 53*l.* 9*s.* 8*d.* is wholly independent of the inquiry. It would be a matter of great importance if, whenever a judgment contains directions which have to be worked out afterwards, the judgment is not final in so far as it contains an absolute order for the immediate payment of a sum of money. I am obliged to differ from the conclusion of the learned registrar. I cannot accede to the argument that the word "creditor" in sub-s. 1 (*g*) means only a person who was a creditor before the judgment. In my opinion, it means a creditor under the judgment—a judgment creditor. I do not differ from any of the former decisions on this sub-section which have been referred to. In *Ex parte Chinery* (1) the order was a garnishee order; it was not a judgment at all. I agree that the balance order in *Ex parte Whinney* (2) was equally not a judgment; the official liquidator was only the representative of the rights of all the creditors of the company, and the proceeding was not in any way of the nature of a judgment. No doubt, in the opinions of some of the learned judges which have been read to us there are one or two expressions which seem to imply that the judgment must be one by which a pre-existing liability of the defendant to the plaintiff is ascertained; but those expressions must be taken in connection with the particular facts of the cases in relation to which they were used. I am of opinion that this appeal must be allowed, and that the bankruptcy notice must stand.

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(1) 12 Q. B. D. 342, at p. 345.

(2) 13 Q. B. D. 476.

(3) 13 Q. B. D. 477.

BRETT, M.R. If this had been only an order, however final, for the payment of a sum of money, I should have thought that it could not have been said to be a "final judgment" within sub-s. 1 (*g*). But, if an order for the payment of money forms part of a judgment which is in itself final, I think you cannot divide the judgment into two parts, and say that the one part is, and that the other is not final. The question, therefore, is whether this order for the payment of costs is part of a judgment of the Chancery Division which is a final judgment. It is of no use to refer to cases which relate to judgments at Common Law, for no such thing is known in the Queen's Bench Division as a judgment which is to be worked out afterwards in any way. There might have been a trial of certain issues, and by consent the damages might have been referred to be ascertained by an arbitrator. But in such case the verdict on the issues was not a judgment. A final judgment at Common Law was always a judgment for debt or damages, and the taxed costs of the action. In such a case the costs formed part of the judgment. The question is whether in the Chancery Division there cannot be a "final judgment" when everything which has to be done by the Court itself is finished. Is that a final judgment which directs certain things to be done and certain inquiries to be made, and certain other things to be done on those inquiries being answered? If the Court ordered the result of the inquiries to be reported to itself before the judgment was given, it would not be a final judgment. But, if the Court orders something to be done according to the answer to the inquiries, without any further reference to itself, the judgment is final, and an order for the payment of costs when taxed, which is part of the judgment, is a final judgment for the costs. The costs when taxed are then a debt due in respect of a final judgment. The refined argument that the judgment must be one which has been obtained by a man who was previously a creditor of the defendant will not bear discussion; the result of it would be to shut out from sub-s. 1 (*g*) everything but a judgment for a debt. The registrar has pushed the previous decisions of this Court upon this subsection further than they really go or were intended to go.

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(1) 12 Q. B. D. 342.

(2) 13 Q. B. D. 476.

Cotton, L.J. I am of the same opinion. The question is whether the appellant is "a creditor who has obtained a final judgment" against the respondent. Is this order a judgment at all? Clearly it is. It is the final judgment at the trial of an action, though it contains a direction to make certain inquiries. It is a final judgment at the trial that the defendant had broken his covenant, and that there ought to be a perpetual injunction to restrain him from committing further breaches, and it is accompanied by an order for the payment by the defendant of the costs of the action. In my opinion that is a final judgment for the payment of the taxed amount of the costs. The inquiry which is directed as to the damages caused to the plaintiff by the defendant's breach of covenant in no way interferes with the judgment for costs. *Ex parte Chinery* (1), which related to a garnishee order, has no bearing on the present case. In that case if the order was a final order, it certainly was not a judgment. When a new act of bankruptcy is created by the legislature, we ought to give to their words their strict meaning.

I should say no more, but for the fact that the decision of the learned registrar seems to have been founded upon a misapprehension of some expressions used in my judgment in *Ex parte Chinery.* (1) In order to decide whether a garnishee order was

(1) 12 Q. B. D. 342.

a final judgment, we had to consider what was the meaning of the expression "final judgment." It is a judgment in an action between parties brought to establish some right of the plaintiff against the defendant. In giving judgment in that case I made use of these words (1): "I think we ought to give to the words 'final judgment' in this sub-section their strict and proper meaning, i.e., a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established—unless there is something to shew an intention to use the words in a more extended sense." If a defendant has committed a tort, there is a previously existing liability on his part to the plaintiff. So here, there was a previously existing liability of the defendant arising out of his covenant contained in the partnership deed. He undertook not to carry on business as a solicitor within certain limits of space; he had broken that agreement, and his liability in respect of that breach was established by the judgment. Taking the very words of my judgment they apply exactly to this case. Of course the order for the payment of costs did not enforce a pre-existing liability of the defendant, but that order is part of a final judgment which did. I do not wish in any way to qualify what I said in *Ex parte Chinery*. (2)

Earl of Selborne, L.C. Nothing has been opened to us which shews that the respondent has any counter-claim against the appellant which he could not have set up in the action.

Brett, M.R., concurred.

Cotton, L.J. If, at the trial of the action, the defendant had desired to have the partnership accounts taken, he had a right to insist upon it. As he did not do so, in my opinion we cannot now say that we are satisfied that he has a counter-claim which he could not set up in the action.

Solicitors for appellant: *Hamlin, Grammer & Hamlin.*
Solicitors for respondent: *Rogers & Chave.*

(1) 12 Q. B. D. 345.

(2) 12 Q. B. D. 342.

W. L. C.

1885
Feb. 20.

[IN THE COURT OF APPEAL.]

Ex parte TURQUAND. In re PARKER.

Bankruptcy—Reputed Ownership—Trade Custom—Hiring of Furniture—Hotel Keeper—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), *s.* 44, *sub-s.* 3—*Bill of Sale—Registration—Transfer of Registered Bill of Sale—Equitable sub-Mortgage—Bills of Sale Act,* 1878 (41 *&* 42 *Vict. c.* 31), *ss.* 4, 10.

The custom for hotel-keepers to hire the furniture of their hotels is so notorious, and has been so often proved, that it need not now be proved, but the Court will take judicial notice of it. And the custom extends, not only to furniture in the strictest sense of the word, but to all the articles which are necessary for the furnishing of an hotel for the purpose of using it as an hotel.

The effect of the custom is absolutely to exclude the reputation of ownership by the hotel-keeper of all those articles in the hotel, at the time of his bankruptcy, which are within the scope of the custom, without regard to the question whether the particular articles are or are not in fact hired by him.

Consequently, articles which are his property subject to a mortgage by bill of sale, will be excluded from the operation of the reputed ownership clause.

A memorandum by way of equitable sub-mortgage given by the transferee of a registered bill of sale, accompanied by a deposit of the registered bill of sale and the transfer, does not require registration as a bill of sale under the Bills of Sale Act, 1878, even though, after the mortgage, the transferee acquires by assignment the equity of redemption of the original grantor.

On the 23rd of February, 1881, J. E. Dyson, the lessee and occupier of the Beach House Hotel, at Westgate-on-Sea, executed a bill of sale to E. F. Davis of all the furniture, fittings, and effects (including stock-in-trade, plate, linen, books, and china) in the hotel which were the property of Dyson, to secure the payment of 6000*l.* with interest. This bill of sale was duly registered.

By deed dated the 25th of November, 1881, E. F. Davis, in consideration of 6000*l.*, transferred his bill of sale to F. S. Parker and W. S. Parker, solicitors and co-partners, subject to the proviso for redemption therein contained.

On the 28th November, 1881, F. S. and W. S. Parker obtained an advance of 16,500*l.* from their bankers, Messrs. Coutts & Co., which was secured by a memorandum of equitable charge and by the deposit with them (inter alia) of the bill of sale and the transfer of the 25th of November, 1881. The memorandum stated that Messrs. Coutts & Co. would hold the securities deposited

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with them "as pledged to you for better securing the above advance of 16,500*l.*, as well as your former advances to us, together with interest thereon respectively." This memorandum was not registered as a bill of sale.

On the 12th of October, 1882, F. S. and W. S. Parker purchased for value from J. E. Dyson, and took from him a surrender of his lease of the hotel, the reversion of which they had previously acquired, and an assignment of his equity of redemption in the furniture and effects comprised in the bill of sale. The same day possession of the hotel and furniture, &c., was given to Messrs. Parker, who thereafter carried on the business by their managers down to the date of their being adjudicated bankrupt.

On the 20th of March, 1884, the Messrs. Parker were adjudicated bankrupt on an act of bankruptcy committed on the 22nd of February, 1884, and Messrs. Turquand & Whinney were subsequently appointed trustees. Since the adjudication, Messrs. Coutts & Co. had been in possession of the property comprised in the bill of sale, and the business of the hotel had been carried on by them or their managers.

This was an application by the trustees for a declaration that they were entitled to the property comprised in the bill of sale, on the grounds (1) that the memorandum of equitable charge was a bill of sale, and, not being registered, was void as against them under the Bills of Sale Act, 1878; and (2) that the property comprised in the bill of sale was in the possession of the bankrupts as reputed owners at the commencement of the bankruptcy.

Dec. 16. *Cooper Willis, Q.C.*, and *J. E. Linklater*, for the trustees. The goods were in the reputed ownership of the bankrupts at the commencement of the bankruptcy. The existence of a custom for hotel keepers to hold their furniture on hire is not disputed: *Crawcour* v. *Salter* (1); but there is no evidence here that the goods were hired. Next, it is admitted that the memorandum of equitable charge is a bill of sale, and, being unregistered, the question is whether it comes within the exception of a "transfer or assignment" of a registered bill of sale in s. 10 of the Bills of Sale Act, 1878. Those words are no doubt very wide, but it is contended that a reasonable construction and some limit to their application must be placed upon them, and that they must be restricted to a transfer or assignment of the whole interest and rights of the original grantor or grantee, and those claiming directly through them, and do not extend to an interest carved out of the original title—to in fact a sub-mortgage by deposit like the present case; and the subsequent purchase by the Parkers of the original equity of redemption does not put their mortgagees in any better position.

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(1) 18 Ch. D. 30.

Vaughan Hawkins, for Messrs. Coutts & Co. The custom for hotel-keepers to hold their furniture on hire being now judicially established: *Crawcour* v. *Salter* (1), the doctrine of reputed ownership does not apply, and evidence as to hiring is immaterial and unnecessary. Then the memorandum of equitable charge is a devolution of the title of the original bill of sale: *Horne* v. *Hughes.* (2) It is a mere "transfer" of the original bill of sale within s. 10 of the Bills of Sale Act, 1878, and does not require registration. The mortgagees do not claim to hold it for more than the amount secured by it.

Cooper Willis, Q.C., in reply, referred to *Ex parte Brooks.* (3)

Cave, J. In this case the trustees apply for an order for the delivery up to them of certain furniture in and about the Beach House Hotel. The first ground on which the application is made is that the furniture in question was in the order and disposition of the bankrupts. With regard to that point the facts are few. On the 22nd of February, 1884, the Messrs. Parker committed an act of bankruptcy. At that time they were carrying on the business of hotel-keepers at the Beach House Hotel, and that furniture was being used for the purpose of carrying on that business. Now on that point I am clearly of opinion that the case of *Crawcour* v. *Salter* (1) is a conclusive authority. It was there held that there was so well-known and common a custom on the part of hotel-keepers to hire furniture that the fact that an hotel-keeper is in possession of furniture does not at all lead to the conclusion that that furniture is his own. Now

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(1) 18 Ch. D. 30.

(2) 6 Q. B. D. 676.

(3) 23 Ch. D. 261.

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the 44th section of the Bankruptcy Act, 1883, says, that the goods must be in the order and disposition of the bankrupt "under such circumstances that he is the reputed owner," that is to say, under such circumstances that the ordinary reputation prevails with those who deal with him that he is the owner of the goods. Now the effect of the decision of *Crawcour* v. *Salter* (1) is that there is such a well-known and common custom of hiring furniture on the part of hotel-keepers that no person who is in the habit of dealing with an hotel-keeper could for one moment assume because he is in the possession of furniture that that furniture belonged to him; consequently the reputation of ownership does not arise at all, and it is perfectly immaterial whether, in fact, the furniture is or is not hired. In no case does the reputation of ownership arise, and that is the custom of which it appears to me I am bound to take judicial notice. I am of opinion therefore that the first point fails.

The second point arises under the Bills of Sale Act, 1878, and is of somewhat more difficulty. [His Lordship then stated the facts and continued:—] Now the question arises whether, in the events which have happened, the memorandum of equitable mortgage, which undoubtedly is a bill of sale within the Bills of Sale Act, is void as not being registered. It is a document executed under the Act of 1878. But that Act must, of course, be read along with the earlier Act which it superseded. The original Bills of Sale Act, 1854, contains a recital that "frauds are frequently committed upon creditors by secret bills of sale of personal chattels whereby persons are able to keep up the appearance of being in good circumstances and possessed of property, and the grantees or the holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of the creditors." That was the evil against which the Act was framed, namely, that a person might be apparently in the possession of a quantity of goods, and yet he might by a secret bill of sale have denuded himself of the property in the goods, so that when creditors who had trusted him on the strength of this possession came to issue execution against him, they found a secret bill of sale put forward, whereby

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(1) 18 Ch. D. 30.

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they were deprived of the expected fruits of their judgment. In this case there was originally a bill of sale executed by Dyson in favour of Davis. That bill of sale undoubtedly did require to be registered, and was registered. It required to be registered because Dyson was at that time the owner and in possession, and by that mortgage he gave Davis the right to seize the goods. The right to seize and take possession of the goods was in one person, the apparent ownership and the possession of them in another—the grantor, and under those circumstances the Act required that the bill of sale should be registered, and that was done. Then came an assignment from Davis to Parkers, and then a further assignment from Parkers to Messrs. Coutts. Now, in my judgment, at all events under the circumstances which have happened, the assignment from the Messrs. Parker to Messrs. Coutts, or whatever name you choose to give the document, did not require to be registered. They had a perfectly good title at the time when that document was executed to seize—what? Not the goods of Parkers, but the goods of Dyson. That document gave them no power to seize Parkers' goods at all. It transferred to them the power to seize Dyson's goods which had originally been given to Davis by the bill of sale of the 23rd of February, 1881, and, as I have said, the transfer was not one which required to be registered. That being the state of things, if Dyson had continued in possession, it is clear that this bill of sale which was executed in favour of Messrs. Coutts would have been a perfectly valid document, because the original bill of sale was registered, and this was nothing more than a transfer of it. Again, if Dyson had assigned his equity of redemption, then clearly again the seizure would be good. The mischief described in the statute would no doubt to some extent exist, because persons who dealt with the new owner of the Beach House Hotel would, assuming *Crawcour* v. *Salter* (1) out of the way, suppose him to be the owner of the property, and they would be met, nevertheless, by the bill of sale; but inasmuch as that bill of sale at the time when it was given was properly registered, the fact that, under the circumstances that have happened afterwards, it gave Messrs. Coutts power to seize the goods of some one who was not the original creditor, but merely an assignee of the original grantor, would not make the bill of sale invalid. Now in this case Parkers had possession under a right which did not exist at the time they executed the charge in favour of Coutts & Co. At the time when that document was executed they had no right to take the possession which they subsequently took. I do not stop to inquire, because I think it is not necessary to inquire, whether the result would have been the same if Messrs. Parker had taken possession under any power reserved to them in the transfer to them from Davis. Their possession was acquired subsequently to the execution of that memorandum, and was acquired, not through any document which was executed to them before they had given that memorandum to Messrs. Coutts, but by virtue of the subsequent purchase from Dyson. Therefore it seems to me that they are in point of fact in the same position as if they had been entirely new purchasers; and that the fact that the persons who subsequently acquired the right to these chattels from Mr. Dyson, and who were in possession at the time when the act of bankruptcy occurred, were the persons who had actually assigned their mortgage to Messrs. Coutts, is a mere accident. It might have been otherwise, but their possession did not take its rise from any right which was in existence at the time the memorandum of November 1881 was executed. They were in possession solely by virtue of the assignment from Dyson; and it appears to me that this is sufficient to dispose of the case, and that this memorandum is neither within the mischief nor the words of the Act. Consequently, Messrs. Coutts hold under a document which at the time it was given them did not require to be registered. The result, therefore, is that this application must be refused with costs.

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(1) 18 Ch. D. 30.

Order accordingly.

H. L. F.

From this decision the trustees appealed.

Feb. 20. *Cooper Willis, Q.C.*, and *J. E. Linklater*, for the appellants. If there is a notorious trade custom, such as will exclude the reputation of ownership by a trader of goods in his possession, it applies only to goods which are in his possession in pursuance of the custom. If it is a notorious custom for hotel-keepers to hire their furniture, the reputation of ownership is excluded only as to furniture which is in fact hired, not to furniture which, as here, was the property of the hotel-keeper himself subject to a bill of sale. In such a case the doctrine of reputed ownership applies, notwithstanding the custom: *Crawcour* v. *Salter* (1); *Ex parte Brooks* (2); *Priestley* v. *Pratt.* (3)

[Earl of Selborne, L.C., referred to *Ex parte Watkins.* (4)]

At any rate, the custom extends only to furniture strictly so called; it does not apply to many of the articles which were in the hotel, and which are included in the registrar's order, e.g., crockery and glass.

The document of the 28th of November, 1881, is a bill of sale within s. 4 (5) of the Bills of Sale Act, 1878, and it required registration under s. 8. It is not exempted by s. 10. It is a sub-mortgage of the Parkers' interest under the first bill of sale with a new equity of redemption; it is not a "transfer" of the original bill of sale. It is a bill of sale of the Parkers' interest in the goods, and it ought to have been registered as affecting their credit. At the commencement of the bankruptcy the goods were the Parkers' property, and they were in their apparent possession.

[Earl of Selborne, L.C. The fact that, after the execution of the memorandum of the 28th of November, 1881, the Parkers bought the equity of redemption of the goods can make no difference as to the necessity of registration of the memorandum.]

A transfer of a bill of sale is a bill of sale as regards the transferor; s. 10 only means that a transfer need not be registered as regards the original grantor; it ought to be registered for the protection of the creditors of the transferor. Sect. 10 assumes that the original grantor remains in possession of the goods.

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(1) 18 Ch. D. 30.

(2) 23 Ch. D. 261.

(3) Law Rep. 2 Ex. 101.

(4) Law Rep. 8 Ch. 520.

(5) Sect. 4 provides that "the expression 'bill of sale' shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred."

Sect. 8 requires the registration of "every bill of sale to which this Act applies," "within seven days after the making or giving thereof."

By s. 10, "A transfer or assignment of a registered bill of sale need not be registered."

Macnaghten, Q.C., and *Vaughan Hawkins*, for Messrs. Coutts, were not heard.

EARL OF SELBORNE, L.C. The argument on the question of reputed ownership has proceeded, as it appears to me, upon a misapprehension of the nature of that doctrine. When the existence of a custom notorious in a particular trade or business is proved, the effect of which is that every one who knows the custom knows that articles to which it is applicable, and which are in the place in which the trade or business is carried on, may or may not be the property of the person who is carrying on the trade or business—may or may not be held by him for other persons—then the doctrine of reputed ownership is absolutely excluded as to all the articles which are within the scope of the custom. If the custom were such as has been just now suggested, viz., that in hotels chairs and tables and furniture of that description are ordinarily hired, but crockery is not, then, of course, chairs and tables would be within the custom, and crockery would not. But the custom which was proved in *Crawcour* v. *Salter* (1) related to the furniture in hotels generally, the word "furniture" being a large word of description, sufficient, if used in a will, to pass furniture of every kind. If in this case the trustee intended to rely on a distinction between some kinds of furniture to which the custom is known to be applicable and others to which it is not, his case should have been presented and supported in a different way. The custom must, I think, as proved, be taken primâ facie to apply to all the furnishings of an hotel, of whatever kind. That being so, the effect of the custom is to give notice to all those who know it, or to whom the knowledge of it ought to be imputed, that the furniture of an hotel is not presumptively the property of the person who is occupying the hotel and carrying on the business—it may or may not be so. A man who knows so much as that has no right to say that there is a reputation of ownership by the hotel-keeper of the tables and chairs and other articles of furniture in the hotel if they do not happen in point of fact to be hired, while there is no such reputation as to those articles which are hired. The reputation does not apply to the particular articles at all, one way or the other. Where there is such a known custom as to exclude the general application of the law of reputed ownership, any one who gives credit to the trader upon the assumption that some of the articles in his possession may belong to him does so, as Mr. Linklater well expressed it, at his own risk. And, if he were to go and ask the trader questions as to the ownership of the articles, his question should be, not, On what terms do you hold this or that article, but, Is it your own property? and any title of any other person, whether it arose under a contract of that particular kind as to which the custom is notorious, or in any other way, would be sufficient to prevent that particular thing from being within the reputed ownership of the trader, when the things in the place generally were not. So much for that point.

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(1) 18 Ch. D. 30.

With regard to the other point, it seems to me to be reasonably clear. If, on the 28th of November, 1881, Messrs. Parker had actually acquired from Dyson an absolute title to the goods of of which they were then in possession, the registered bill of sale would have been entirely exhausted, and the title to the goods would no longer have been made under it. I quite agree that, if those goods had been made a security to Messrs. Coutts, there ought to have been a registration of the document by which that was done. But, on the 28th of November, 1881, the registered bill of sale was not exhausted. The right of Messrs. Parker was merely to hold by way of security Dyson's goods and chattels under a registered bill of sale from him, and the statute expressly says that a transfer or assignment of such a registered bill of sale, that is, when it is still an operative instrument governing the title, need not be registered. The statute makes no distinction between a bill of sale by way of security, upon which an equity of redemption is reserved, and an absolute bill of sale, between an equitable transfer and a legal one. This transaction of the 28th of November, 1881, which gave the title to Messrs. Coutts, was not a dealing with the specific goods at all; it was merely an equitable assignment or transfer of the existing security on those goods, to which the title was constituted by the original registered bill of sale.

Under these circumstances, I think Cave, J., was clearly right in holding that the case is governed by the 10th section of the Act and not by the 4th.

Brett, M.R. The first question is, whether certain articles, which are found in an hotel kept by a man who has become bankrupt and which are not really his own property, are within the doctrine of reputed ownership. It has been held that there is so notorious a custom for hotel keepers to carry on their business by means of furniture which is not their own, but which they hire, that, from the mere fact of finding furniture in an hotel, no one has a right to infer that it belongs to the hotel-keeper, and, consequently, that the doctrine of reputed ownership does not apply to the furniture of an hotel. It has been held that this custom is so notorious that the Court will not require any further proof of it, and that it is so notorious that no man of business would really rely upon the possession of furniture as an inducement to give credit to an hotel-keeper. The custom has been so often proved that the Courts will now take judicial notice of it. That is well settled.

But it is said that the Courts have not yet declared what they understand by "furniture." It is obvious from the nature of the case that "furniture" must include everything which goes to the furnishing of an hotel for the purpose of using it as an hotel. It is said that the custom only applies to such things as sofas, chairs, and tables. I suppose it may at least be said to apply to bedsteads. But what is the use of a bedstead for the purpose of carrying on an hotel if you have not sheets and blankets and counterpanes? What is the use of an hotel if it has not wash-hand basins and wash-hand stands? You cannot carry on an hotel unless you have those things. Therefore linen and crockery must come within the custom. What is the use of attempting to carry on an hotel if you have not soup-tureens, wine glasses and tumblers? The very nature of the case shews at once that to attempt to split up furniture into different classes with regard to some of which the custom applies, and with regard to others of which it does not, is as a matter of business ridiculous. "Furniture" must include everything which is necessary for the furnishing of an hotel for the purpose of carrying it on as an hotel. I have heard this custom proved over and over again, and, if I had not, I should not require much proof of it. What is the result of it? It is this, that the mere fact of articles of this description being in an hotel, and used by the keeper of the hotel in his business, does not entitle any one to say that he is the reputed owner of them.

Then, as to the second point,—is the document in question a bill of sale which required registration? To my mind it is not a bill of sale within any part of the definition contained in the 4th section, properly read. It is not within the 4th section at all. But that section is necessarily so worded that a perverse ingenuity might say, and the legislature foresaw that it would say, that such a document comes within some of the terms of s. 4, although it was not intended that it should, and therefore they inserted in s. 10 a positive and clear declaration that such a document is not to be within the 4th section. It is taken out of the Act altogether, and does not, therefore, require registration. I do not see how the legislature could have spoken in plainer language. I do not think this document comes within s. 4, and for this reason, it is a transfer of an interest under a bill of sale which is already registered, and does not give to the transferee any interest in the goods themselves. If this transfer were the only document he would have no interest in the goods. It is the original bill of sale which gives the interest in the goods, and that interest is transferred to him. I should think that no one who looks carefully at the 4th section would say that such a transfer comes strictly speaking within any of the words of the section. But, in order to exclude the possibility of doubt, the legislature have said in plain language in s. 10, We do not intend such a document to be within s. 4.

It seems to me that both points are clearly against the appellants.

Lindley, L.J. I am of the same opinion. The moment the custom of hotel-keepers to hire their furniture is clear, it follows, to use Mr. Linklater's expression, that any one who deals with an hotel-keeper must take his chance whether the articles of furniture which are found in the hotel are the hotel-keeper's property or not. He cannot say that they are so primâ facie, because the hotel-keeper is in possession of them; that inference is rebutted by the well-known custom. He takes his chance.

As to the other point, there might be some little difficulty on s. 4 if it stood alone. But, when you look at s. 8, which says that all bills of sale to which the Act applies shall be registered, and then at s. 10, which says that a transfer or assignment of a registered bill of sale need not be registered, all difficulty vanishes. In s. 4 the words are, "agreement by which a right in equity to any personal chattels is *conferred*," not "*transferred*." That difference is important, for s. 10 deals specifically with transfers. The real truth is that this document is not a transfer of goods, or one which confers any title to goods; it is a sub-mortgage, a mortgage of a mortgage. It is clearly within s. 10 and not within s. 4, and it does not require registration. Therefore I think that the decision of Cave, J., was perfectly correct on both points.

Appeal dismissed with costs.

Solicitors for trustees: *Linklater, Hackwood, & Co.*
Solicitors for Coutts & Co.: *Farrer, Ouvry, & Co.*

W. L. C.

1885
Jan. 16.

[IN THE COURT OF APPEAL.]

YATES (PLAINTIFF IN ERROR) *v.* THE QUEEN (DEFENDANT IN ERROR).

Criminal Law—Criminal Information for Libel—Newspaper Libel and Registration Act, 1881 (44 & 45 *Vict. c.* 60), *s.* 3—*Information filed without Fiat of Director of Public Prosecutions.*

The 3rd section of the Newspaper Libel and Registration Act, 1881, which enacts that no criminal prosecution shall be commenced against any proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or her Majesty's Attorney General in Ireland, being first had and obtained, does not apply to a criminal information for libel filed by order of the Court.

WRIT OF ERROR. The record set out a criminal information which had been filed by order of the Court of the Queen's Bench Division against the plaintiff in error for a libel published by him in a newspaper called *The World.* The record also set out a plea in abatement, in which the plaintiff in error alleged as a reason for his not being compelled to answer to the information that the criminal prosecution for libel in which the information had been filed was against him as the publisher of the said newspaper, which was a newspaper within the meaning of the Newspaper Libel and Registration Act, 1881, and was commenced without the written fiat or allowance of the Director of Public Prosecutions in England being first had and obtained.

To this plea there was a demurrer and joinder in demurrer, and afterwards a judgment of respondeat ouster. The record then set out a plea in bar, which in effect alleged the same reason why the information should not be further proceeded against the plaintiff in error as was alleged as a reason for the plea in abatement, viz., the commencement of the criminal prosecution for libel without the fiat of the Director being first obtained. To this last plea there was also a demurrer and joinder in demurrer, and afterwards judgment by the Queen's Bench Division, that the plea so lastly pleaded was insufficient, and that therefore the plaintiff in error should be adjudged convicted of the premises charged on him in the information.

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YATES v. THE QUEEN.

The matters assigned for error were in effect that it appeared in the record and proceedings that the criminal prosecution for libel in which the information had been exhibited had been commenced against the plaintiff in error as the publisher of the said newspaper without the written fiat of the Director as required by s. 3 of the Newspaper Libel and Registration Act, 1881, 44 & 45 Vict. c. 60.

Charles Russell, Q.C., and *Box*, (*Poland*, with them), for the plaintiff in error. The Queen's Bench Division gave judgment against the plaintiff in error on the demurrers to the pleas without argument, the point raised by them having been decided against the plaintiff in error by the majority of the Court in *Reg.* v. *Yates* (1) on the application to quash and take this very information for libel off the file. Error has now been brought in order to obtain the opinion of this Court, as there was no appeal from the judgment of the Queen's Bench Division in a criminal matter. The question is whether the fiat of the Director of Public Prosecutions must be obtained before commencing a prosecution by information for libel in a newspaper, and that raises this question, whether such prosecution is or not a criminal prosecution within the meaning of s. 3 of the Newspaper Libel and Registration Act, 1881? If it is not such prosecution, what is it? Before the Act of 1881 there were only four statutes which dealt with prosecutions for libel, viz., Fox's Act, 32 Geo. 3, c. 60, 60 Geo. 3 & 1 Geo. 4, c. 8, 3 & 4 Vict. c. 9, and 6 & 7 Vict. c. 96; and in two of them "criminal information" is included by name, and in the other two by necessary intendment, so that if the contention on behalf of the defendant in error is right, the present Newspaper Act will be the first one in which such prosecution by information is not criminal. There are, however, numerous authorities to shew that a criminal information is a criminal prosecution: 2 Hawkins' Pleas of the Crown, ch. 26, ss. 4, 7, and 8, pp. 357, 359; Corner's Crown Practice, p. 168; 1 Chitty's Criminal Law (2nd ed.), ch. 22, p. 841; 4 Black. Comm., ed. by Coleridge, pp. 301–310; 4 Stephen's Comm., 8th ed. p. 372; *Reg.* v. *Steel* (2); and *Reg.* v. *Fletcher.* (3) Then the 3rd section

(1) 11 Q. B. D. 750.

(2) 2 Q. B. D. 37.

(3) 2 Q. B. D. 43.

of the Newspaper Libel and Registration Act, 1881, is clear; it is that "no criminal prosecution shall be commenced against any proprietor," &c., "of a newspaper for any libel published therein without the written fiat or allowance of the Director of Public Prosecutions."

[BRETT, M.R. Does that include an ex officio criminal information?]

It is not necessary to go that length, but if necessary to do so it will be contended that it does include an ex officio information. Theoretically there may appear to be some incongruity in requiring the fiat of the Director, who is an inferior officer to the Attorney General, but in practice there would be none, for there would be no conflict between them. Moreover, ex officio informations for libel are very rarely filed; in fact there is no record of any such having occurred since 1830. Does not the defence of privilege which is given by s. 2 of the statute in respect of newspaper reports of meetings extend to a proceeding by criminal information, and if it does, as it must be admitted it does, how can it be said that the prosecution in s. 3 is used by the legislature in a different sense from the proceeding against the newspaper proprietor referred to in s. 2. The 4th section deals with a different class of criminal procedure, namely, with that which comes within the summary jurisdiction of magistrates. By the Vexatious Indictments Act (22 & 23 Vict. c. 17), no indictment can be presented unless the prosecutor has been bound over to prosecute, or the accused has been committed or bound over to appear, or unless the indictment has been preferred by the direction of a judge or of the Attorney General. That Act does not include an indictment for a libel, but now by s. 6 of this Act of 1881, "libel and every offence under this Act" is to be deemed an offence within 22 & 23 Vict. c. 17. What then was the use and object of s. 3 of this Act of 1881, after the Act had made libel within the Vexatious Indictments Act, if it did not mean to give some exceptional protection to newspaper proprietors and to extend to prosecution by criminal information, which was a common mode of prosecuting a newspaper proprietor for a libel? It is said that a criminal information for libel though at the instance of a private prosecutor is the act of the Crown through its officer the Queen's coroner, who informs the Court of the libel, and that the Crown is not bound by a statute unless expressly named; but that is not so, for in matters affecting the administration of justice the Crown is bound though not named, and there are several statutes as to indictments in which there is an express exception of prosecutions by the Attorney General ex officio (see 5 & 6 Wm. 4, c. 33, s. 1, and 16 & 17 Vict. c. 30, s. 4), which shews that but for such exception general words such as "prosecutor" would have included an ex officio prosecution. Then the object of s. 3 of the Newspaper Libel and Registration Act, 1881, was to prevent the commencement of a vexatious criminal prosecution for libel against a newspaper proprietor, and for that purpose to require before such commencement the fiat of the Director of Public Prosecutions.

[COTTON, L.J.:—When does a prosecution by criminal information commence?]

When the rule nisi is applied for. *Clarke* v. *Postan* (1), cited by Hawkins, J., in his judgment in *Reg.* v. *Yates* (2), shews that making the criminal charge before a magistrate is the commencement of the prosecution. In 1 East's Pleas of the Crown, p. 186, reference is made to a case of *Rex* v. *Willace*, where "the judges at a conference unanimously held that the information and proceedings before the magistrate were the commencement of the prosecution." Before the application for the rule nisi the Director's fiat should be obtained, or at all events before the rule nisi is served.

Sir H. James, A.G., and *Danckwerts*, for the defendant in error. Admitting that a criminal prosecution may for some purposes include a criminal information, yet the 3rd section of the Newspaper Libel and Registration Act, 1881, must not be so construed as to make a proceeding by criminal information a criminal prosecution within the meaning of that section. Where general words are used in a statute which, if the large meaning of which they are capable be given to them, will produce an absurdity and go beyond what the statute intended to remedy, the Courts will limit such words so as not to apply them to what would have such a result. Instances of this are to be found in *Stradling* v.

(1) 6 C. & P. 423.

(2) 11 Q. B. D. at p. 757.

Morgan (1), *Eyston* v. *Studd* (2), *Heydon's Case* (3), and *Wigan* v. *Fowler.* (4) "Primâ facie," says Williams, J., in *Harding* v. *Preece* (5), "the ordinary and grammatical sense of the language, especially if the words used have a well known and technical meaning, is to be adhered to, but, as Lord Selborne says in the case of *Caledonian Ry. Co.* v. *North British Ry. Co.* (6), 'the more literal construction ought not to prevail if it is opposed to the intention of the legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.'" Now it can hardly be contended that the 3rd section of the Newspaper Libel and Registration Act applies to an ex officio criminal information by the Attorney General, especially as if it applied in Ireland the Attorney General would have to obtain his own fiat from himself. Therefore the 3rd section cannot necessarily apply to all criminal informations. The fiat of the Director is required by the 3rd section to be obtained before the criminal prosecution is commenced. It has been argued that the prosecution by criminal information commences when the Court is applied to for leave to file it. That cannot be correct. It cannot be said to be commenced before the information is filed. The 4 & 5 Wm. & M. c. 18, recognises the filing as the commencement, and requires certain things to be done before such commencement. In *Ditcher* v. *Denison* (7) the question arose when a suit under the Church Discipline Act commenced, and it was held only to commence when the accused was served with a citation to appear, and not by the issuing of a commission nor by the filing of articles. The suing out the capias was held in *Attorney General* v. *Brown* (8) to be the commencement of an information in the Exchequer for revenue penalties. To the same effect is Manning's Exchequer Practice, p. 220. If the filing of the information be the commencement, then after the Court of Queen's Bench Division has thought fit to order the filing of an information for libel (and *Reg.* v. *Labouchere* (9) shews how carefully the discretion of the

(1) Plowd. 203.
(2) Plowd. 465.
(3) 3 Rep. 7.
(4) 1 Stark. 459.
(5) 9 Q. B. D. 297.
(6) 6 App. Cas. 122.
(7) 11 Moo. P. C. 324.
(8) Forrest, 110.
(9) 12 Q. B. D. 320.

Court is exercised) it is, according to the contention of the plaintiff in error in this case, competent for the Director to say whether such order shall be obeyed or not. That would be most unseemly, and it cannot be supposed that the statute ever meant to give him such power. It would be ousting the jurisdiction of the Queen's Bench Division Court, and that cannot be done without express particular words in the statute: *Smith Llewellyn and Others* v. *Commissioners of Sewers* (1), *Rex* v. *Moreley* (2), and *Foster's Case.* (3)

Charles Russell, Q.C., replied.

Cur. adv. vult.

Jan. 16. BRETT, M.R. In this case an information for libel had been filed at the instance of a private prosecutor against the plaintiff in error, the proprietor of a newspaper, and the case is now brought before this Court on a writ of error, and as it is a criminal case this Court has no jurisdiction to entertain it except on error. We have nothing, therefore, to do with the application to the Queen's Bench Division to quash the information, and the only thing we have now to do is to say whether there is error on the record to the extent of shewing that the Court had no jurisdiction to entertain the information, and for that purpose we must look only to the information itself, and the question must come to this, whether the fiat of the Director of Public Prosecutions is a condition precedent to the jurisdiction of the Court to give leave to file the information, and not merely a matter of procedure which may or may not be waived. Now is it a condition in any sense that the fiat of the Director of Public Prosecutions must be obtained? that is to say, does the 3rd section of the Newspaper Libel Act, 1881, apply to a criminal information at the suit of a private prosecutor? If it does, then the fiat must be obtained. If it does not so apply, then there is no objection to the information, or to anything that appears on the record in the present case.

Now it has been argued for the plaintiff in error that the 3rd section applies to a criminal information for libel at the suit of a private prosecutor, because it is said the 2nd section clearly applies to such an information, and that if that does, then the first recital in the preamble to the Act which refers to "criminal prosecutions for newspaper libel," must apply to such informations, and that then the same construction must be put on the 3rd section, and that must therefore, as well as the 2nd, apply to a criminal information. That the 2nd section does apply to such an information I have no doubt, but does it follow from that that the phrase "criminal prosecutions," in the first recital in the preamble, applies to criminal informations. If it does not, the utmost that can be said is this, the 2nd section goes beyond such recital. The phrase in the 2nd section is not "criminal prosecution," but "proceeding," which is a very different term and one much wider than criminal prosecution, and I have no doubt that a proceeding by information for libel is a criminal proceeding, but that does not make it a criminal prosecution. But the sections may be larger and go beyond the recital. It is clear, for instance, that the 6th section does, for it extends to all libels, and is not confined like the recital to a newspaper libel. The 2nd section may also go beyond the preamble, and therefore that section, which uses a different term from what is in the preamble, does not assist one in determining to what the 3rd section applies. I agree that if the term "criminal prosecution" had clearly had a certain meaning in the preamble to the Act, it must have had the same meaning in the 3rd section; but the question is what is the meaning of it in either the preamble or section ?

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(1) 1 Mod. 44; S. C., 1 Vent. 66.

(2) 2 Burr. 1040.

(3) 11 Rep. 56.

The next argument was that in various Acts of Parliament relating to the same subject-matter, the terms "indictments," and "information," have been, it was said, used indiscriminately together. But, in the first of these Acts to which we were referred, viz., 32 Geo. 3, c. 60, the terms are "indictment or information for the making or publishing any libel," and therefore so far from using one of them as including both, that Act distinguishes them. The 60 Geo. 3, and 1 Geo. 4, c. 8, does not use either of these terms, and in 3 & 4 Vict. c. 9, the phrase is "any civil or criminal proceeding," and the words "criminal prosecution" are not used at all, and therefore that Act gives no assistance as to the meaning of those words in this 3rd section. Then in 6 & 7 Vict. c. 96, the words used are "indictment or information," which shews that where it was intended to include both, the legislature took care to so express it. It was also argued that the phrase "criminal prosecution" was one ordinarily used by lawyers to express that which would comprise both a prosecution by indictment and a criminal information. So far from agreeing to that, I think, according to my experience, that that is the very phrase they would not use when they meant a criminal information, and that by a criminal prosecution for libel they would mean a prosecution by indictment or before a magistrate, as distinguished from a proceeding by criminal information. Then the argument comes to this, that the expression "criminal prosecution," is a general phrase comprising several modes of prosecution, namely, 1st, by indictment; 2nd, by proceedings before a magistrate, ending in a commitment for trial; 3rd, by recourse to the summary jurisdiction of a magistrate; and 4th, by information. What then is the canon of construction when the question is raised whether one or other of such modes is meant by the use of such general phrase? It seems to me that if one of them can be shewn not to be within the mischief of the enactment, and would, if the Act applied to it, lead to a manifest absurdity as regards the administration of the law, the Court ought to say that the enactment does not describe such particular mode of prosecution, and that it is therefore not within it. What we have then to consider is, whether a criminal information for libel in a newspaper is within the mischief which the Act was intended to remedy. If such mischief applies to criminal information at all, I see nothing to separate criminal information ex officio from criminal information by private persons. Now what was the mischief against which the Act was directed? Newspaper proprietors are not entitled to publish libels, and ought only therefore to be protected against liability when in giving information for the public benefit, and not for their own advantage or purposes, they have published a libel. They were, however, liable to be harassed by prosecutions for such libels without any previous notice. If the grand jury threw out the bill, the newspaper proprietor would probably not sustain any injury, but there might be a bill found against him and he might consequently be indicted without having had any previous means of knowing that such a charge was pending, and might be put to great unnecessary expense and anxiety, because the grand jury would only require a primâ facie case to be shewn in order to find the bill. In the same way, if the prosecutor went before a magistrate, the magistrate would not have heard the defence before he issued his summons, and therefore some mischief would necessarily arise, and it was against that mischief and that state of things by which a prosecution for libel might be commenced without first giving the newspaper proprietor an opportunity of answering the complaint, that this Act was passed. That does not apply to proceedings by criminal information for libel, whether at the instance of a private person or of the Attorney General ex officio. For on the application for an information at the instance of a private person, the prosecutor must bring before the Court the libel, and an affidavit that he is innocent of what is charged against him in the libel, and then only a rule nisi is granted, and the alleged libeller has an opportunity before the rule is made absolute of giving his explanation and the reasons, if any, why the proceeding by information should not be allowed. So in the case of an ex officio information, with this additional protection, that there is the responsibility of the highest officer of the law, the Attorney General (who is bound by his oath of office to exercise his powers impartially according to the best of his belief), that the case is one which is fit for being proceeded against by criminal information. Therefore, it appears to me, that neither kind of criminal information, ex officio or otherwise, is within the mischief aimed at by this statute. One must go, however, further, and see if the applying this enactment to either kind of information will lead to an absurdity, for if the enactment applies to one it applies to both, and therefore it is necessary as a true test to see if in either case there would be an absurdity. For this purpose one must determine when the proceeding by criminal information commences, for it is only the moment before it commences that the fiat of the Director of Public Prosecutions must be obtained. Now before the statute of 4 & 5 Wm. & M. c. 18, the commencement of the prosecution was the exhibiting the information to the officer to be filed. Is there then anything in that statute which alters that? Certainly not, for it deals only with what is required to take place before the information is exhibited. How can it be said that an application to the Court for leave to exhibit the information is the commencement of the prosecution by the information? No one would say that asking leave of a judge to issue the writ of summons would be the commencement of the action, unless it be correct to say that to ask leave to do a thing, is to commence to do such thing. It is said that the application to the Court is the commencement, and that it is so closely analogous to the application to a magistrate, that if it be not the commencement, one would be obliged to say that laying an information before a magistrate in order to obtain a summons, would not be the commencement of the prosecution. For my own part I consider that laying the information before the magistrate would not be the commencement of the prosecution, because the magistrate might refuse to grant a summons, and if no summons, how could it be said that a prosecution against any one ever commenced? But be that as it may, I do not admit the analogy to be good, and it seems to me that in any case the commencement of a prosecution by a criminal information is the filing or exhibiting the information, and that therefore the fiat of the Director of Public Prosecutions (if necessary at all) need not be obtained until the moment before that has been done. If so, the application to the Court for leave to file such information having been made, the Court might grant a rule nisi and make such rule absolute before the fiat of the Director need be applied for, and yet if the contention on the part of the plaintiff in error be sound, such Director might then refuse his fiat, and so in effect reverse the decision of the Queen's Bench Division, or in the case of the most important information filed by the Attorney General for the public safety, if he ordered the information to be filed, yet notwithstanding that such Director is subordinate to the Attorney General, and is by law to act under his directions, he might veto the action of that great legal officer. In either case, there would be an indecent absurdity in the administration of the law, and even if the application for the information were taken to be the commencement of the prosecution, and the fiat were required for such application, there would be the same absurdity, though not so glaring. The Attorney General might come to the conclusion that it was for the public good that an information for a libel should be filed, and yet it would be necessary to go to the Director of Public Prosecutions and ask him if he would agree therein with the Attorney General and grant his fiat. That would seem to me to be an indecent absurdity in the administration of the law. As regards ex officio informations it seems to me impossible to believe that the legislature ever intended to enact that which would lead to such an absurdity.

Then if I am right in saying, as I have, that the enactment must apply to both classes of information if it applies to either, and if I shew it cannot apply to one of them, it necessarily follows that it cannot apply to the other. Consequently a criminal information which is not within the mischief of the Act is not a criminal prosecution to which the 3rd section applies, but it does not therefore follow that such 3rd section has no application at all. I am of opinion that the words "criminal prosecution" in that section apply to criminal prosecution by indictment or by proceeding before a magistrate for a committal or for his absolute decision. It was argued that in that view one would have to strike out those words "criminal prosecution" in that 3rd section, because they would produce an absurdity, as the 6th section incorporates the Vexatious Indictments Act (22 & 23 Vict. c. 17), and that therefore as the Act would apply to vexatious indictments for libel, there would be nothing left for the 3rd section to operate on if it be limited to prosecutions by indictments, and it would practically be struck out of the statute. In the first place it is to be observed that the 6th section goes beyond the preamble to the statute and deals with every libel, and is not confined to newspaper libels, and it is difficult to understand how it came to be inserted at all in the statute. That 6th section says that "every libel and every offence under this Act" shall be deemed an offence within the Vexatious Indictments Act. If a criminal information for libel be a prosecution within the meaning of this Newspaper Libel Act, 1881, it is one to which this 6th section cannot apply, because it is not a prosecution by indictment. How then is this 6th section to be construed with the 3rd? One must either say that to the protection of having the fiat of the Director of Public Prosecutions, which is given by the 3rd section, there is added that of having the committal of the magistrate, the direction of a judge, or the sanction of the Attorney General, or in the alternative that a criminal prosecution cannot be commenced without the fiat of the Director, except where the sanction of the Attorney General or of a judge has been obtained. In my opinion the latter is the true view; the legislature never could have intended that the direction of a judge or of the Attorney General should be overruled by the Director of Public Prosecutions; and acting therefore according to the well-known canon rule of construction, that where a general phrase is used applicable to several things which if it be applied to one of them will produce an absurdity, it is construed as applying only to such as will not have that result, I have come to the conclusion that the words "criminal prosecution" in the 3rd section of this Act do not apply to "criminal information" either where it be ex officio or at the instance of a private prosecutor. I wish further to add that even if such words do apply to criminal information, I doubt if it would amount to a condition precedent to the jurisdiction of this Court that there should be previously obtained the fiat of the Director of Public Prosecutions. I think it would be only a matter of procedure or of personal protection which might be waived, and not being on the record nor a matter which could properly be on the record it would not be the subject of error. For these reasons, in my opinion, the appeal must be disallowed.

COTTON, L.J. The Master of the Rolls has gone so fully into this case that it is hardly necessary to add anything more, but the case being one of some importance, I think it right that I should state my views, and I shall do so very shortly.

The main point is as to the construction of the 3rd section of the Newspaper Libel Act, 1881. In my opinion, the words "criminal prosecution" in that section are sufficient as a generic term to include prosecution by indictment, by criminal information, and by application before a magistrate, but they are not words which are generally used to describe proceedings by criminal information. It was said in argument for the plaintiff in error that we ought to give effect to words in a statute though they may lead to what we may consider to be an absurdity or incon-

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gruity, and leave it to the legislature to correct the mischief which may result from the fair interpretation of the words. Undoubtedly where Parliament has made use of words which have no application unless they be construed in a way which would lead to an absurdity, it is not for this Court to correct what has been done by Parliament. But it is a very different thing where Parliament has used language of a generic or general character applying to various things. In such a case, if one sees that by applying the language to something which is not within the mischief contemplated by the Act, it will produce manifest absurdity or inconvenience, then according to the rule of construction which is well known, and for which it is unnecessary to refer to any authority, it is the duty of the Court so to construe the general term as not to apply it to that which will have such a result.

What we have to consider is, are the words, "no criminal prosecution," in this 3rd section to be applied to every kind of criminal prosecution? All the judges in the Court below held that ex officio criminal information could not be included, but if it be admitted that the words "criminal prosecution" do not apply to all kinds of criminal information, then it may be equally said that a criminal information, even at the suit of a private prosecutor, is not within the meaning of the 3rd section. It is not, I think, within the mischief intended to be guarded against by this enactment. The object of this 3rd section was to prevent newspaper proprietors from being harassed by vexatious prosecutions for libel. Now, as has been pointed out by the Master of the Rolls, there must be a decision of the Court before there can be any criminal information exhibited against a newspaper proprietor for a libel; and if a prosecution by criminal information is not commenced until such information has been exhibited, it cannot have commenced before the application for a criminal information was made to the Court. In my opinion it would be impossible to say that a criminal information would be within the mischief intended to be guarded against by this enactment, especially when one knows that the Court of Queen's Bench Division is most careful in not allowing a criminal information to be exhibited unless satisfied, not only that the matter is not vexatious or frivolous, but that it is of public importance, having regard not only to the charge but to the person against whom it is made.

It is, I think, material, though not essentially necessary, to determine when a criminal prosecution can be said to be commenced when it is by way of criminal information. On behalf of the plaintiff in error it has been said that the first application for the rule nisi is such commencement, but how can it be said that a prosecution is commenced before a person is summoned to answer a complaint. The application to the Court is merely to direct a criminal information to be exhibited, and many things may have to be done before a prosecution can be instituted, as, for instance, under this very section the allowance of the Director of Prosecutions must be obtained; but that does not make the application to him the commencement of a criminal prosecution any more than the obtaining an order where necessary for issuing a writ, as in the case of a writ served abroad, is the commencement of the action. Then it was said there was an analogy between this and proceedings before a magistrate, and that there was authority to shew that prosecutions by means of proceedings before a magistrate commenced when the information was first laid before him. The analogy is not perfect, but even if it were the authorities, when looked at, in no way support the proposition contended for. The case relied upon in support of the contention was that of *Clarke* v. *Postan.* (1) It was an action for having maliciously brought a false charge against the plaintiff before a magistrate, and in the judgment nothing whatever is stated as to when the prosecution was commenced. It appears clearly, however, from the facts there, that not only had an information been filed, but that the plaintiff had been summoned before a magistrate to answer a charge made against her, so that it was not laying an information or making a charge, but the summons before the magistrate, which ought to be considered the commencement of the prosecution. If any authority were wanting on the question it is to be found rather in the case of *Rex* v. *Robinson*, a manuscript note of which was read by Lord Kenyon in *Rex* v. *Cole* (2), as deciding that "affidavits on a motion for leave to file a criminal information ought not to be entitled," as in a proceeding by the Crown against the proposed defendant, but that "all affidavits made after the rule was made absolute must be so entitled," that is, that the criminal prosecution had commenced then, and therefore affidavits must then be so entitled. The real commencement of the prosecution by criminal information is when the information is filed, and there would be, in my opinion, the most manifest incongruity and indecency in allowing the decision of the Court of Queen's Bench Division, after hearing both parties and deciding that a criminal information should be filed, to be overruled by the decision of the Director of Public Prosecutions. Of course if the prosecution by criminal information could be said to be commenced when the rule nisi was granted, the incongruity would not be so strong as if the commencement were only when the information was exhibited; but still there would be, in my opinion, sufficient to justify us in saying these general words in the 3rd section are not to be held to apply to a criminal information, because when the Court has granted the rule nisi it has considered the matter, and has formed an opinion with the care it always takes upon such applications, so that there would be enough at least to call upon the person against whom the information was asked to be exhibited, to come and answer the charge. The Master of the Rolls has dealt with that part of the case which turns on the statute of 4 & 5 Wm. & M. c. 18, but I think it right to observe that it is within the discretion of the Queen's Bench Division to order the information to be exhibited, and that it is not to be filed as a mere matter of course at the instance of any person who may desire to take proceedings. That certainly further strengthens the argument that the beginning of the prosecution by criminal information is at the time when the information is exhibited.

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(1) 6 C. & P. 423.

(2) 6 T. R. 640.

I have thus dealt only with the construction of s. 3 of the Newspaper Libel Act, 1881, but it is right to consider also the arguments which were addressed to us on behalf of the plaintiff in error on ss. 2 and 6 of that Act. We have not to decide what will be the effect of s. 3 as regards what is required by the Vexatious Indictments Act which is embodied in s. 6, and I think it is necessary only to say that, as at present advised, I should be of opinion that the general words of s. 3 do not apply to an indictment directed by a judge or by the Attorney General. That will not, however, render s. 3 inoperative, for there will be still modes of prosecution to which it will apply, although they may not be numerous. One must recollect this, that s. 6 applies to all libels—not solely newspaper libels—and that may perhaps explain some of the difficulty which arises upon it. There remain two other points. It was said s. 2 must apply to proceedings by criminal information as well as to proceedings by civil action; therefore, if that is so, why not s. 3? Now if s. 2 does apply to proceedings by criminal information, it answers really the object pointed out by the preamble, because it does then amend the law affecting civil actions and criminal prosecutions arising from newspaper libels. The protection given by that section was intended to be an answer or defence to a criminal information as well as to an indictment, for it would be incongruous to say that in one form of prosecution there would be a defence but not in another.

But s. 3 is entirely a different matter. It applies to the protection to be given against vexatious proceedings by way of criminal prosecution. If there are modes of criminal prosecution which are not within the mischief and which would raise a manifest inconvenience if included under this section, then there is a reason for excluding them from the general terms used in the section, whereas it would be an inconvenience to exclude the defendant in a criminal information from a defence given him by s. 2. In my opinion, therefore, the plaintiff in error fails and the judgment of the Court below should be affirmed.

LINDLEY, L.J. I have come to the same conclusion. The question turns upon the true construction of s. 3 of the "Newspaper Libel and Registration Act, 1881." From the beginning of the Act to the end the words "criminal information" are not found, and we find no indication whether the Act applies to criminal information, except such as may be gathered from the reason for the enactment.

Sect. 3 is very wide. The words are "no criminal prosecution shall be commenced against any proprietor of a newspaper," and those words, in my judgment, would be wide enough to include prosecutions by criminal information if there were not cogent reasons why they should not apply to that particular method of prosecution. If criminal information was within the mischief contemplated by the legislature and intended to be cured by this 3rd section, I should have thought the language wide enough. Criminal information is within the mischief intended to be amended by ss. 2 and 15, and they are both wide enough to apply to criminal informations, and the reasons for extending them to that form of prosecution are the same as for extending them to indictments; but when we come to s. 3, the case assumes an entirely different aspect. In order to shew what are the reasons which induce me to say s. 3 does not apply to criminal informations, it is necessary to point out the securities already afforded by the law to a person prosecuted in that particular way. The object of the Act, as apparent from the group of sections from 2 to 7, was to protect persons accused of libel, and, in particular, the proprietors and editors of newspapers, from being unnecessarily harassed by frivolous prosecutions. Now, let us consider what protection was afforded when they were proceeded against by criminal information. A criminal information could not be filed ex officio unless the Attorney General was of opinion that the matter was of that public importance as to render it desirable to proceed in that way. Is it to be supposed that a public functionary like the Attorney General would proceed ex officio in a trumpery and ridiculous case? Then as regards informations not filed ex officio, we know from the preamble of 4 & 5 Wm. & M. c. 18, that persons did vexatiously obtain criminal informations, but that was stopped by that Act, and now before there can be a criminal information at the prosecution of a private person the Queen's Bench Division must be satisfied upon evidence before it that the prosecution is one which ought to be instituted. Therefore it appears to me to be obvious that prosecutions by criminal information are not within the mischief which it was the object of the legislature to cure by this 3rd section. It is true that it might not follow as a matter of law that because a case is not within the mischief of an enactment that therefore it is not within the general words used, but there are other reasons here. There is upon the face of the statute an indication, which is plain to my mind, that at all events ex officio informations could not have been included. I refer to the language at the end of the 3rd section which relates to the Irish Attorney General. It appears to me to be perfectly ridiculous to suppose that in Ireland at all events that section could be intended to apply to criminal informations ex officio. There is no reason why they should apply to criminal informations ex officio in England more than in Ireland. Is it to be supposed that Parliament could have intended by general words of this kind to bring about what might be really a scandalous conflict of jurisdiction between the Director of Public Prosecutions on the one side and the Attorney General or the Queen's Bench Division on the other? Are we to interpret words which are capable of being satisfied by a less extensive construction, so as to bring about that which would be inconvenient and almost a scandal?

The Director of Public Prosecutions is a public officer whose duty it is to act under the superintendence of the Attorney General, and can it be conceived that the legislature intended that he should be able to overrule the Attorney General, or still more, the Queen's Bench Division? To my mind this Court ought not to construe any statute in such a way as to bring about such an absurdity unless driven to it by words which will admit of no other construction; and therefore, apart from any other reason, it appears to me that we ought to come to the conclusion that these general words in the 3rd section were never intended to apply, and ought not to be construed as applying, to criminal informations of any kind, whether ex officio or of other kinds.

Now there are difficulties arising upon the Act which are very considerable, especially when we come to contrast and work together ss. 3 and 6. But these difficulties do not touch the point we have to decide. Sect. 6 is worded strangely, and I do not profess to understand it. It says that every libel, not newspaper libel only, and "every offence under this Act," shall be deemed to be an offence within and subject to the provisions of the Vexatious Indictments Act (22 & 23 Vict. c. 17). I have tried to discover, if possible, what is meant in that section by the words "every offence under this Act;" but I have not succeeded.

However we see this, that all libels, including of course newspaper libels, are made subject to the provisions of the Vexatious Indictments Act. How is that to be worked with s. 3? The Vexatious Indictments Act gives a considerable protection to the proprietors of newspapers for libels published in them, and no indictment for libel can be presented, even to the grand jury, unless there be either a direction of the judge or the sanction of the Attorney General, or a person bound over to prosecute. What then is the joint effect of ss. 3 and 6? The difficulty arises in the case of a judge or the Attorney General directing a prosecution for libel under the Vexatious Indictments Act. It may be rather theoretical than practical. It is extremely improbable that a judge would direct a prosecution for libel, but he may, and if he does, is his direction to be overruled under s. 3 by the Director of Public Prosecutions? and it appears to me almost idle to suppose that if the Attorney General directs a prosecution under the Vexatious Indictments Act, he is to be overruled by his subordinate officer. Therefore although these difficulties are very much greater than the one we have to deal with, I should solve them in the same way as I understand Mr. Justice Field solved them, and say that s. 6 does not apply to informations, nor to indictments for libel directed by a judge or by the Attorney General, but does apply to all other prosecutions. There are certain modes of prosecution left to which s. 3 can be applied without producing any absurdity or any conflict of jurisdiction, or other inconvenient result which Parliament could not have contemplated. In my opinion we ought so to construe s. 3 as to avoid those inconveniences as far as possible. It appears to me therefore that our judgment ought to be for the defendant in error.

Judgment for the defendant in error.

Solicitors for plaintiff in error: *Lewis & Lewis.*
Solicitors for defendant in error: *Horns & Murray.*

W. P.

[IN THE COURT OF APPEAL.]

1885
Jan. 28.

THE ATTORNEY GENERAL *v.* BRADLAUGH.

Parliament—Election—Oath of Allegiance—Disbelief in a Supreme Being—Oath not binding upon the Person taking it as an Oath, but only as a Solemn Promise—Penalty—Parliamentary Oaths Act, 1866 (29 *Vict.* c. 19), ss. 3, 5 *—"Solemnly and publicly made and subscribed"—Promissory Oaths Act,* 1868 (31 & 32 *Vict.* c. 72)*—Evidence—Journals of House of Commons—Practice of House of Commons—Practice—Appeal—Information by Attorney General to recover Penalty—"Criminal Cause or Matter"—Trial at Bar—Motion for New Trial on Ground of Misdirection and Misreception of Evidence—Notice of Motion—Supreme Court of Judicature Act,* 1873 (36 & 37 *Vict.* c. 66), ss. 19, 47.

A member of parliament, who does not believe in the existence of a Supreme Being, and upon whom an oath has no binding effect as an oath but only as a solemn promise, is, owing to his want of religious belief, incapable by law of "making and subscribing" the oath of allegiance appointed by the Parliamentary Oaths Act, 1866, ss. 1, 3, as amended by the Promissory Oaths Act, 1868; and if he takes his seat and votes as a member, although he has gone through the form of making and subscribing the oath appointed by those statutes, he will be liable upon an information at the suit of the Attorney General to the penalty imposed by the Parliamentary Oaths Act, 1866, s. 5.

Omichund v. *Barker* (1 Atkyns, 21; Willes, 538) followed and applied.

In order that the oath of allegiance imposed upon members of the House of Commons upon taking their seats by the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868, may be "solemnly and publicly made and subscribed" within the meaning of s. 3 of the former statute, it must be taken by a member with the assent of the House according to the requirements of the Standing Orders, and after he has been called upon by the Speaker to be sworn.

Upon the trial of an information at the suit of the Attorney General against a member of the House of Commons for voting without having taken the oath of allegiance within the meaning of the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868, evidence of the practice observed in the House of Commons as to taking the oath of allegiance is admissible for the purpose of explaining the construction of those statutes, and the journals of the House of Commons are admissible as evidence for the purpose of shewing, from the member's conduct as therein recorded, that owing to his want of religious belief he is by law incapable of taking an oath.

By Brett, M.R., and Lindley, L.J., Cotton, L.J., doubting, an information at the suit of the Attorney General to recover penalties under s. 5 of the Parliamentary Oaths Act, 1866, from a member of Parliament for voting without having taken the oath of allegiance required by that statute, as amended by the Promissory Oaths Act, 1868, is not a "criminal cause or matter" within the meaning of the Supreme Court of Judicature Act, s. 47, and an appeal may be

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brought from any order or judgment therein of the High Court to the Court of Appeal:—

By Brett, M.R., on the ground that the information is in its nature a civil proceeding, and, therefore, that an appeal lies under the Supreme Court of Judicature Act, 1873, s. 19:—

By Lindley, L.J., on the ground that even although the information may be to some extent of a criminal nature, nevertheless before the passing of the Supreme Court of Judicature Acts, 1873, 1875, an appeal would have lain under the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), ss. 31, 34, 35, from a decision of the Court of Exchequer to the Court of Exchequer Chamber, and that the Supreme Court of Judicature Acts, 1873, 1875, do not take away any right of appeal existing before the passing of those statutes.

Semble, by Brett, M.R., that even if the information could be regarded as a criminal proceeding, nevertheless an appeal would lie, for by the Supreme Court of Judicature Act, 1873, s. 47, the right of appeal is taken away only in the case of indictments, of criminal informations for indictable misdemeanors filed in the Queen's Bench Division, and of criminal proceedings before justices.

An appeal lies to the Court of Appeal from any order or judgment made or given by the Queen's Bench Division either during, or afterwards with respect to, a trial at bar of a civil proceeding, and whether or not the appeal is brought from a decision upon a motion for a new trial on the ground of misdirection or wrongful reception of evidence; but the appeal must be brought on by notice of motion, an ex parte application for a rule nisi to the Court of Appeal being irregular.

Information in the Queen's Bench Division by the Attorney General to recover penalties of 500*l.* each against C. Bradlaugh for voting as a member of the House of Commons without complying with the provisions of the Parliamentary Oaths Act, 1866.

The first count alleged that C. Bradlaugh having been theretofore duly elected to serve as a member of parliament for the borough of Northampton, and being a member of the House of Commons, did on the 11th of February, 1884, vote as such member in the said House without having made and subscribed the oath by the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868, appointed.

The fourth count (1) alleged that C. Bradlaugh having been theretofore duly elected to serve as a member of Parliament for the borough of Northampton, and being a member of the House of Commons, did on the 11th of February, 1884, vote as such member in the said House, without having in the then present Parliament and since his said election solemnly and publicly made and subscribed the oath by the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868, appointed, at the table in the middle of the said House, and whilst the full House of Commons was there duly sitting with their Speaker in his chair, at such hour and according to such regulations as the said House did by its standing order direct, that is to say, at any time during the sitting of the said House before the orders of the day and notices of motion had been entered upon or after they had been disposed of, and without any debate or business being interrupted for that purpose.

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(1) It is unnecessary to mention the second and third counts, inasmuch as no finding by the jury was taken upon either of them.

The fifth count alleged that C. Bradlaugh having been theretofore duly elected to serve as a member of the Commons House of Parliament for the borough of Northampton, and being a person having no belief in a Supreme Being, and being a person upon whose conscience an oath as an oath had no binding force (of all which said matters the said House then had full cognizance and notice by means of the avowal of C. Bradlaugh), did upon the 11th of February, 1884, go through the form of making and subscribing the oath appointed by the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868, and did thereafter on the 11th of February, 1884, being such member as aforesaid, vote as such member in the said House, and without having made and subscribed any oath, save as aforesaid.

Plea: Not guilty by statute (21 Jac. 1. c. 4, s. 4).

Joinder of issue.

The information was tried at bar in the Queen's Bench Division during the month of June, 1884, before Lord Coleridge, C.J., Grove, J., and Huddleston, B., and a special jury, and the following facts were proved:—

In the spring of 1880 C. Bradlaugh, the defendant, was elected a member of parliament for the borough of Northampton, and on the 3rd of May, 1880, he claimed "to be allowed to affirm as a person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath." This claim was founded upon the Evidence Amendment Acts, 1869 and 1870. He afterwards expressed his willingness to take the oath usually taken by members of parliament after their election, and it was ultimately referred to a select committee to consider whether the

House of Commons had any right to prevent the defendant from taking the oath. During the sitting of the committee the defendant appeared as a witness, and certain questions were put to him as to the effect which the taking of the oath would have upon him, and a letter written by him also was produced before the committee. From his answers to the questions put to the defendant whilst he was before the select committee, and from the contents of his letter, it might be inferred that an oath would have no greater effect upon the defendant's mind than a promise, and that he had no belief in the existence of a Supreme Being, although the oath might be binding on his conscience as a solemn promise. Various other proceedings took place with reference to the defendant's claim to take his seat as a member of the House of Commons (1); but ultimately in February, 1882, he was expelled from the House, and on a new writ being issued for the election of a member for the borough of Northampton, he was again returned. On the 11th of February, 1884, whilst the House of Commons was sitting, but without having been called upon by the Speaker, the defendant accompanied by two members of parliament advanced to the centre of the table immediately opposite to the Speaker. As he approached the table, the Speaker rose from his chair and called "Order, order;" but the defendant, directly he reached the table, proceeded to read from a paper which he had brought with him, and having read the words contained in that paper, he kissed a book which he had brought with him, and which was a copy of the New Testament. He signed the paper at the table and left it there together with the certificate of his return. The contents of the paper were as follows: "I, Charles Bradlaugh, do swear that I will be faithful and bear true allegiance to Her Majesty, Queen Victoria, her heirs and successors, accord-to law; so help me God. (Signed) C. Bradlaugh." The defendant did not sign the test-roll. Whilst the defendant was doing at the table within the House what is above mentioned, the Speaker sat down and wrote upon a paper, and then rose up and directed the defendant to withdraw, and he accordingly withdrew below the bar. The defendant voted in three divisions of the House of Commons on the 11th of February, 1884. According to the practice observed in the House of Commons as to administering the oath, the Speaker called (although not by name) those members wishing to take their seats to come to the table: a member, desirous of being sworn, accordingly came to the table being introduced by two members: he was there sworn by the clerk of the House, and when the member had been sworn the clerk took him further up the table to the test-roll, which he subscribed. The only standing order of the House of Commons having reference to the swearing-in of members of the House of Commons was passed on the 30th of April, 1866, and was in the following terms:—"Members may take and subscribe the oath required by law, at any time during the sitting of the House, before the orders of the day and notices of motion have been entered upon, or after they have been disposed of; but no debate or business shall be interrupted for that purpose." By No. 178 of the Rules and Orders of the House relating to Public Business, 1883, it was provided that "whenever Mr. Speaker rises during a debate, any member then speaking, or offering to speak, is to sit down, and the House is to be silent so that Mr. Speaker may be heard without interruption." In proof of the case for the Crown the Journals of the House of Commons were put in, and the clerk to the House of Commons, Sir T. Erskine May, was called as a witness to depose to the practice and the usage of the House.

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(1) See, for instance, *Bradlaugh* v. *Clarke*, 8 App. Cas. 354.

Lord Coleridge, C.J., in summing-up the case told the jury that whatever might be the form of the oath, the signification was the same, it was the calling upon God to witness, that was, to take notice of what was said, and it was the invoking His vengeance, or the renouncing His favour, if what was said was false, or what was promised was not performed; and further that "I swear" in an English Act of Parliament meant that "I invoke the protection or the vengeance of the Supreme Being, according as I perform or break the promise with which such appeal is now made to Him."

In answer to questions put by Lord Coleridge, C.J., the jury found that the Speaker was sitting in the chair at the time when the defendant made and subscribed the oath, but that he was sitting for the purpose of preparing or correcting notes which he was about to address to the defendant, and he had not resumed his seat for the purpose of allowing the defendant to make and subscribe the oath. The jury further found that upon the 11th of February, 1884, the defendant had no belief in a Supreme Being, and was a person upon whose conscience an oath, as an oath, had no binding force, and that the House of Commons had full cognizance and notice of these matters by reason of the avowal of the defendant. The jury also found that the defendant did not take and subscribe the oath according to the full practice of Parliament, and that the defendant did not take and subscribe the oath as an oath. Upon these findings the Queen's Bench Division, sitting for the trial at bar, ordered a verdict to be entered for the Crown upon the first, fourth, and fifth counts of the information, for separate penalties of £500.

In December, 1884, the defendant, before the same judges, who presided at the trial at bar, Lord Coleridge, C.J., Grove, J., and Huddleston, B., moved ex parte for a new trial or to enter judgment for the defendant on the ground of improper reception of evidence, of misdirection, and also on the ground that the verdict was against the weight of evidence, and he also moved ex parte for seven days' time to move in arrest of judgment after the Court should have given their opinion on the motion for a new trial. The learned judges sitting in the Queen's Bench Division refused the rule.

The defendant then moved ex parte in the Court of Appeal for a rule of the like nature. The Court of Appeal were of opinion that if the evidence was properly admitted, it was amply sufficient to justify the findings of the jury, and therefore the rule was refused upon the ground of the verdict being against the weight of evidence. But the Court of Appeal granted a rule for a new trial or to enter judgment for the defendant on the ground of misdirection and misreception of evidence, upon condition that the defendant should at the time of the argument upon the rule bring on and argue the points to be urged by him, why judgment ought to have been arrested in the Queen's Bench Division.

Jan. 26, 27, 28. *Sir H. James, A.G.*, and *Sir H. Giffard, Q.C.* (*Sir F. Herschell, S.G.*, and *R. S. Wright*, with them), for the Crown. There are two preliminary objections to the hearing of this appeal: the first is, that the information is a "criminal cause or matter" within the meaning of the Supreme Court of Judicature Act, 1873, s. 47, and therefore that there can be no appeal to this Court on the ground of misdirection or misreception of evidence, and also that no motion in arrest of judgment can be made in this Court, the defendant's only remedy being by writ of error upon the judgment of the Queen's Bench Division, for which the Attorney-General's fiat must be obtained. The offence created by the Parliamentary Oaths Act, 1866 (29 Vict. c. 19), s. 5 (1) is a misdemeanor, and it is not the less a misdemeanor because the only penalty inflicted in terms is a fine. It was expressly stated by Lord FitzGerald in *Bradlaugh* v. *Clarke* (1) that the statute "creates a new public misdemeanor imposing a penalty as a punishment." The proceeding therefore is of a criminal nature, and in that case it was held that a common informer could not sue for the penalty as a debt due to himself, the reason being that the offence was of a public nature, and therefore of a criminal character; it follows that the remedy must be of a criminal character, and therefore no appeal will lie. This is an information filed by the Attorney General in order to recover a penalty; and the nature of informations of that kind was much discussed in *Attorney General* v. *Radloff.* (2) In that case the Court of Exchequer was equally divided, two of the judges, Platt and Martin, BB., holding that an information (which in that case was for breach of the laws as to customs,) was not a criminal proceeding, and two of them, Pollock, C.B., and Parke, B., holding that it was. It is true that in that case some stress was laid on the fact, that the offender might be summarily convicted before justices; but this circumstance was really immaterial; under 11 & 12 Vict. c. 43, justices have power to convict summarily for both civil and criminal offences. It is submitted that the view of Pollock, C.B., and Parke, B., was correct, and that informations filed by the Attorney General in order to recover penalties are criminal proceedings. Moreover, to consider the question from a different point of view, although the penalty imposed by the Parliamentary Oaths Act, 1866, s. 5, might perhaps have been recovered by an action of debt, nevertheless the wrongful act or offence, of which the defendant has been convicted, must be deemed to be of a criminal nature; for by s. 3 of the Parliamentary Oaths Act, 1866, a member of parliament is liable to be indicted if he does not take the oath of allegiance, and the remedy under s. 5 may be regarded as merely cumulative. Some wrongs are both of a civil and criminal nature, such as libel and assault, and it is erroneous to contend that the existence of a civil remedy causes a wrongful act to become of a civil nature. There is no distinction in principle between this case and *Mellor* v. *Denham* (3); the only difference is that in that case the appeal was from the refusal of justices to convict for the contravention of the bye-laws of a school board. *Mellor* v. *Denham* (1) was followed in *Reg.* v. *Whitchurch.* (2) It is true that the penalty is to be recovered "by action:" Parliamentary Oaths Act, 1866, s. 5; but the word "action" is of wide signification, and includes even criminal proceedings; this is plain from Com. Dig. Action (D. 1) Placita Coronæ, and also from Bacon's Abridgment, Actions in General (A.), where it is said that "actions are divided into criminal and civil." These passages are cited and relied upon by the Earl of Selborne, L.C., in *Bradlaugh* v. *Clarke.* (3) The Queen by her prerogative can recover the whole of a penalty in any Court, even although a moiety be expressly given to a common informer: *Rex* v. *Hymen.* (4)

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(1) The preamble to the Parliamentary Oaths Act, 1866 (29 Vict. c. 19), recites that "it is expedient that one uniform oath should be taken by members of both Houses of Parliament on taking their seats in every Parliament."

Sect. 1: "The oath to be made and subscribed by members of both Houses of Parliament on taking their seats in every Parliament shall be in the form following." The form given in s. 1 is superseded by a form given in the Promissory Oaths Act, 1868.

Sect. 3: "The oath hereby appointed shall in every Parliament be solemnly and publicly made and subscribed by every member of the House of Peers at the table in the middle of the said House before he takes his place in the said House, and whilst a full House of Peers is there with their Speaker in his place, and by every member of the House of Commons at the table in the middle of the said House, and whilst a full House of House of Commons is there duly sitting, with their Speaker in his chair, at such hours and according to such regulations as each House may by its Standing Orders direct."

Sect. 5: "If any member of the House of Peers votes by himself or his proxy in the House of Peers, or sits as a peer during any debate in the said House, without having made and subscribed the oath hereby appointed, he shall for every such offence be subject to a penalty of five hundred pounds, to be recovered by action in one of Her Majesty's Superior Courts at Westminster; and if any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen, without having made and subscribed the oath hereby appointed, he shall be subject to a like penalty for every such offence, and in addition to such penalty his seat shall be vacated in the same manner as if he were dead."

By the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 2, "the oath in this Act referred to as the Oath of Allegiance shall be in the form following; that is to say, 'I,   , do swear that I will be faithful and bear true allegiance to Her Majesty, Queen Victoria, her heirs and successors, according to law. So help me God.'"

Sect. 8: "The form of the oath of allegiance provided by this Act shall be deemed to be substituted . . . in the case of the Parliamentary Oaths Act, 1866, for the form of the oath thereby prescribed to be taken and subscribed by members of Parliament on taking their seats."

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(1) 8 App. Cas. 354, at p. 385.
(2) 10 Ex. 84.
(3) 5 Q. B. D. 467.

The second preliminary objection is that in the case of a trial at bar there can be no motion in the Queen's Bench Division for a new trial on the ground of misdirection or misreception of evidence, and the reason is that it is the full Court itself which is sitting at the trial at bar, and that Court cannot be asked to review its own decision. If no motion can be made to the Queen's Bench Division for a new trial, no appeal will lie to this Court under the Supreme Court of Judicature Act, 1873, s. 19. It was a rule of practice formerly existing at Common Law that a superior Court could not be asked to review its determination, which had been arrived at after solemn consideration: thus, after judgment upon a demurrer, a defendant could not move in arrest of judgment for any exception which might have been taken in arguing the demurrer: 2 Tidd's Practice, ch. 31, p. 740, and ch. 38, p. 918 [9th ed.]; although a different rule applied to judgments by default, they not being given in so solemn a manner. A similar rule applies to trials at bar; all questions of law have been determined after mature deliberation, and the Court cannot be asked to set aside its own decision. This point was noticed in the judgment of the Court of Queen's Bench, delivered by Blackburn, J., in *Reg.* v. *Castro* (5), where a strong doubt was expressed whether it was competent for the Court afterwards to reconsider points of law already decided by

(1) 5 Q. B. D. 467.

(2) 7 Q. B. D. 534.

(3) 8 App. Cas. 354, at p. 362.

(4) 7 T. R. 536.

(5) Law Rep. 9 Q. B. 350, at pp. 353, 354.

the trial at bar. Any decision given during the trial at bar is a matter of procedure only, and is not a "judgment or order" within the Supreme Court of Judicature Act, 1873, s. 19. The present application is for a new trial on the ground of misdirection and misreception of evidence; and although instances are to be found where new trials have been granted after trials at bar, yet they ought to be confined to those cases where the jury have gone wrong, as in *Musgrave* v. *Nevinson* (1); and it appears to have been considered that they ought to be confined to those instances where the jury have misconducted themselves: *Rex* v. *Melling*. (2)

C. Bradlaugh, the defendant in person. As to the first preliminary objection, namely, that this is "a criminal cause or matter" it is plain that the Court of Exchequer, which is now represented by the Queen's Bench Division, was a Court of civil judicature for the purposes of filing informations, and it was so regarded by the legislature when it enacted the Crown Suits, &c., Act, 1865 (28 & 29 Vict. c. 104), ss. 31, 35. The "offence" created by the Parliamentary Oaths Act, 1866, s. 5, is not of a criminal nature; a member of either House of Parliament who commits it incurs only a civil liability, and for this purpose it is immaterial to consider whether the provisions of the 3rd section may be enforced by indictment. And this information is not a criminal proceeding; in Rules of the Supreme Court, 1883, Order LXVIII., r. 1, "criminal proceedings" are treated as different from "proceedings on the revenue side of the Queen's Bench Division." Under the Parliamentary Oaths Act, 1866, s. 5, the penalty might be recovered "by action in one of Her Majesty's Superior Courts at Westminster." At the time of passing the statute the three superior courts of law at Westminster were the Queen's Bench, the Common Pleas, and the Exchequer; but no criminal proceeding could be brought in the Common Pleas, which was a court of purely civil jurisdiction; and as an action under the statute might have been brought under s. 5 in the Common Pleas, it is plain that the "action" is not criminal in its nature. In *Bradlaugh* v. *Clarke* (3) the House of Lords merely decided that the penalty could not be recovered without the authority of the Crown. In *Miller* v. *Salomons* (1) the action was in debt and was treated as a civil proceeding. The true view of the nature of an information filed in the Court of Exchequer to recover a penalty was contained in the judgments of Platt, B., and Martin, B., in the *Attorney General* v. *Radloff* (2). For the Crown reliance has been placed upon *Mellor* v. *Denham* (3) and *Reg.* v. *Whitchurch* (4): but those authorities have no bearing upon the present case: they were appeals from the decisions of justices sitting in petty sessions, and courts of petty sessions are clearly criminal in their nature: this is plain from 11 & 12 Vict. c. 43, which regulates their procedure in cases of summary conviction: by the forms given in the schedule to that statute the failure to comply with an order for the payment of money is punishable with imprisonment. *Rex* v. *Hymen* (5) is not in point; it simply determined that the King could sue for the whole of the penalty in the Court of King's Bench, and that he was not bound to file an information in the Court of Exchequer.

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(1) 2 Ld. Raym. 1358.

(2) 12 Mod. 128.

(3) 8 App. Cas. 354.

As to the second preliminary objection, namely, that no appeal will lie to this Court from a trial at bar on the ground of misdirection and improper reception of evidence, it is submitted that it is not sustainable.

[BRETT, M.R. We all are of opinion that if this information is not a "criminal cause or matter," an appeal lies from any decision pronounced either during or after a trial at bar, and we have power to grant a new trial on the grounds of misdirection and of improper reception of evidence.]

Sir H. James, A.G., in reply, as to the first preliminary objection. It may be that the Crown Suits Act, 1865, ss. 31, 35, which for certain purposes appears to have treated informations in the Court of Exchequer as civil proceedings, did give a right of appeal; but for the reasons already assigned it is plain that the present information is a "criminal cause or matter" within the Supreme Court of Judicature Act, 1873, s. 47, and therefore all right of appeal is taken away by that enactment, except for error on the record to bring which the Attorney General's fiat must be obtained.

(1) 7 Ex. 475; in Ex. Ch. 8 Ex. 778.
(2) 10 Ex. 84.
(3) 5 Q. B. D. 467.
(4) 7 Q. B. D. 534.
(5) 7 T. R. 536.

[BRETT, M.R. A majority of the Court are of opinion that the present information is not a "criminal cause or matter" within the meaning of the Supreme Court of Judicature Act, 1873, s. 47; but we will postpone the statement of our reasons until we deliver judgment upon the merits of the appeal. We must now call upon the defendant to state the grounds, upon which he proposes to urge that the judgment of the Queen's Bench Division ought to have been arrested.]

C. Bradlaugh, the defendant in person, then stated that his motion in arrest of judgment would be confined to the fifth count. That count disclosed no offence known to the law. By the Parliamentary Oaths Act, 1866, s. 3, every member of the House of Commons was to take the oath set forth in s. 1, for which a shorter form had been substituted by the Promissory Oaths Act, 1868; no distinction existed between going through as a matter of form what the law required, and actually doing that which the law required; it was admitted on the face of the fifth count that the defendant had gone through the form of making and subscribing the oath necessary to be taken by members of the House of Commons, and no intent to evade the provisions of either the Parliamentary Oaths Act, 1866, or the Promissory Oaths Act, 1868, was alleged; the defendant, therefore, had complied with the law, and the allegations were immaterial that he had no belief in a Supreme Being, and that an oath, as an oath, had no binding force on his conscience.

Sir H. James, A.G., and *Sir H. Giffard, Q.C.* (*Sir F. Herschell, S.G.*, and *R. S. Wright*, with them), for the Crown, shewed cause against the rule for a new trial or to enter judgment for the defendant, and also against the motion in arrest of judgment. The two preliminary objections having been decided in favour of the defendant, no other technical objections will be urged on behalf of the Crown.

The argument for the Crown upon the merits of this appeal may be divided into two branches; first, the defendant did not solemnly and publicly make and subscribe the oath within the meaning of the Parliamentary Oaths Act, 1866, even if he had been otherwise competent to take it; and, secondly, the defendant owing to his want of religious belief was incapable of taking any oath.

As to the first question, a member of the House of Commons cannot take the oath against the order and against the will of the House. The defendant took the oath without the assent of the House, and the construction of the Parliamentary Oaths Act, 1866, requires that the oath shall be taken with the authority and sanction of the Speaker. The oath was unlawfully taken, inasmuch as it was taken without the assent of the House signified through the Speaker: *Rex* v. *Duke of Bedford* (1); *Rex* v. *Ellis.* (2) These cases shew that an oath cannot be lawfully taken or administered without the assent of those, before whom or in whose presence the oath is to be sworn. It is unnecessary to consider how far this Court can take cognizance of proceedings in Parliament, and what are the powers of the House of Commons as to the expulsion of a member and as to a declaration that his election was void; but upon the facts proved at the trial the defendant did not "make and subscribe the oath" within the meaning of the Parliamentary Oaths Act, 1866, s. 3: he did not "solemnly and publicly make and subscribe" it, and contrary to the standing order he interrupted the business of the House. The defendant may allege that evidence as to the practice and usage of the House of Commons in taking the oath was improperly admitted; but that evidence was rightly admitted in order to explain the meaning of the Parliamentary Oaths Act, 1866, which was passed with reference to the practice and usage existing in that year. Sects. 3 and 5 must be read together; a member is liable to the penalty under s. 5, if he takes the oath without the formalities prescribed by s. 3. If s. 5 were to be read alone, the penalty would not be incurred upon voting, even although a member had merely written and subscribed the oath on the table of the House with a piece of chalk. Then the oath was taken by the defendant in such a manner as to interrupt the business of the House, contrary to the terms of the standing order: he defied the Speaker's authority: this is not a question of technicality, but ot substance. The copies of the Journals of the House of Commons were properly admitted as evidence under 8 & 9 Vict. c. 113, s. 3. The defendant cannot object that evidence was given of what was done behind his back, for only those portions were read which

(1) 1 Barn. 280.

(2) 9 East, 252, n.

bore upon the case, and the Journals under the date of the 3rd of May, 1880, shewed that the defendant had claimed to affirm on the ground that the oath would not be binding on his conscience. The defendant may contend that he might have already taken the oath, and that the Crown was bound to prove that he had not taken it during the Parliament which met in the spring of 1880, and further, that he was not bound to take the oath more than once in the same Parliament. The answer to this contention is that he attempted to take the oath on the 11th of February, 1884, and that this is strong and cogent evidence that he had never taken the oath before that day; and further, that the Parliamentary Oaths Act, 1866, s. 1, enacts that the oath is to be made and subscribed by members of the House of Commons "on taking their seats in every Parliament:" the defendant had been expelled from the House, and having been re-elected he was bound to make and subscribe the oath on taking his seat after his re-election. There was no misdirection in asking the jury whether the defendant had taken and subscribed the oath; his own conduct was the strongest evidence against him. The answers of the defendant to the questions put to him before the select committee of the House were properly admissible against him, and if they are admissible, they shew what his opinions were; his answers were relevant and pertinent to the issues raised by the information.

The second question, namely, that the defendant, owing to his want of religious belief, is incapable of taking any oath, is directly raised by the fifth count of the information. No oath can be legally taken by a person who has no belief in a Supreme Being: this is established by a long string of authorities, but it is only necessary to cite *Omichund* v. *Barker* (1) to shew that in order that an oath may be lawfully taken, there must exist a belief in a Supreme Being. Lord Coke's definition of an oath (3 Inst. 165), may be too narrow, because it confines the taking of an oath to a Christian; but it is otherwise correct, and has been affirmed. The argument for the defendant reduces the oath to a mere form. No oath can be taken by one who does not believe in the existence of a Supreme Being capable of rewarding truth and avenging

(1) 1 Atk. 21; Willes, 538.

falsehood: *Miller* v. *Salomons.* (1) No authority is known to exist in England impugning the broad proposition, that the taking of an oath implies a belief in the existence of a Supreme Being. It was supposed at one time that a witness could be objected to only before he was sworn; but this view cannot be sustained after the answer of the judges in *The Queen's Case.* (2) An authority to a similar effect is to be found in *Jacobs* v. *Layborn.* (3) A witness, who does not regard an oath as binding upon him, nevertheless may be convicted of, and sentenced for, perjury, if he gives false evidence; for he has tendered himself as a competent witness, and he shall not be allowed to take advantage of his own wrong by alleging that he was incompetent to be sworn.

[BRETT, M.R. In 3 Russell on Crimes and Misdemeanors, bk. 5, c. 1, p. 1 [5th ed.], it is said that "perjury, by the common law, appears to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not."]

If a man takes an oath, he himself is estopped from denying its validity; but other persons may object that he is incompetent to take it.

C. Bradlaugh, the defendant in person, in support of the rule and of the motion in arrest of judgment. First, the defendant stated before the Select Committee of the House of Commons that the oath would be binding upon him: it would therefore be binding upon his conscience, and no evidence could be given that it was not, for his statement must be accepted as conclusive: the Queen's Bench Division ought to have directed the jury that the oath had been duly taken. By 1 & 2 Vict. c. 105, it is declared and enacted that every person shall be bound by an oath administered to him in such form and with such ceremonies as he may declare to be binding; there can be no answer to the argument, that a new class was created by that statute to whom an oath might be administered. As to the mode of administering the oath, it is equally valid whether it is administered to the person taking it by himself or by another person: thus the oath appointed by the Office and Oath Act, 1867 (30 & 31 Vict. c. 75), s. 5, might be administered to the person taking it by himself; it was an oath which might be sworn without reference to religious belief, and did not involve any religious test.

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(1) 7 Ex. 475; (in Ex. Ch.) 8 Ex. 778. (2) 2 B. & B. 284.
(3) 11 M. & W. 685.

[BRETT, M.R. The same question would arise under that statute as under the Parliamentary Oaths Act, 1866.]

The Parliamentary Oaths Act, 1866, s. 3, rendered it compulsory on a member to take the oath required by the Act, and he became liable to be punished for a misdemeanor if he did not take it; surely it would be unreasonable to hold that a member willing to comply with the statute can be prevented from taking the oath, and thereby may be rendered liable to fine and imprisonment. Under former legislation a man might have been summoned before justices and compelled under penalties to take the oath of allegiance: could the justices have refused the oath of a particular man and left him exposed to the infliction of the penalties because he was without religious belief? A witness may be subpœnaed and compelled to take an oath, and even may be brought up in custody for that purpose: if the argument for the Crown were correct, it would go to shew that his evidence might be rejected for want of religious belief, and nevertheless that he might be punished for failing to give evidence. As a member of Parliament is compelled to take the oath of allegiance, he is qualified to take it whatever his religious belief may be. The invocation of the Supreme Being is not a necessary part of the oath: *Lancaster and Carlisle Ry. Co.* v. *Heaton* (1); and hence an oath may be taken by a person who does not believe in a Supreme Being. *Rex* v. *Duke of Bedford* (2) turned upon the words of a particular statute. It would be a hardship on the defendant if he were liable to be indicted under s. 3 of the Parliamentary Oaths Act, 1866, for not taking the oath, and if he were liable to be sued for the penalty under s. 5 if he took the oath and afterwards voted.

Secondly, the defendant did not interrupt the business of the House by taking the oath: he obeyed every injunction of the Speaker; it was the Speaker who interrupted the business of the

(1) 8 E. & B. 952.

(2) 1 Barn. 280.

House. Even if the Speaker had called "Order" during the whole time that the defendant was engaged in taking the oath, it would have been lawfully taken: no act of the Speaker or of the House can do away with the ceremony of taking the oath. It was "solemnly and publicly made and subscribed" within the meaning of the Parliamentary Oaths Act, 1866, s. 3; the oath was not taken indecorously, improperly, or without order; the defendant could not sit down without vacating his seat; he might think that the Speaker was calling "order" for the purpose of allowing him to take the oath. At all events, the Speaker resumed his seat. Further, ss. 3 and 5 of the statute are not to be read together; s. 5 is a substantive enactment, and the defendant took the oath according to its provisions, and he is not liable to the penalty thereby imposed. There was no necessity to the assent of the House to the validity of the oath; the House could not interfere with the administration of it. Moreover, the Journals of the House of Commons ought not to have been admitted as evidence: the defendant is not bound by the proceedings of the House in his absence, and there was no lawful evidence as to the practice of the House of Commons: only the standing order, being mentioned in s. 3 of the Parliamentary Oaths Act, 1866, could be lawfully laid before the jury.

Brett, M.R. In this case the appeal or appeals is or are against a judgment or judgments of a Divisional Court of the Queen's Bench Division. There have, in fact, been two judgments of the Divisional Court, the one being the judgment on the trial at bar, and the other being an order refusing a new trial upon an application to the Divisional Court. We allowed the defendant with regard to the latter to move ex parte for a new trial: but considering that the order appealed against was an order of a Divisional Court, there having been no order by a single judge, I think we were wrong in allowing an ex parte motion. In future, if there be a trial at bar, and the judgment be questioned, it can be questioned here at all events only on a motion with notice to the other side. But it seems to me that we may sweep away all forms, and that what we have to deal with is the judgment at bar, and we have to see whether that can be impeached; and if it can be impeached, whether it can be impeached under such circumstances as will induce us to exercise the power vested in us, even treating the appeal as one only, and that against the judgment given on the trial at bar, of granting a new trial.

A great many questions have been raised in this case. In the first place, it was said that the verdict was against the evidence. It was then urged that the findings of the jury had been procured by evidence which ought not to have been admitted, and further, had been procured by misdirection; and that, therefore, they ought not to be allowed to stand, and that as to a part of this record, the judgment on it ought to be arrested. It has been urged on the part of the Crown that there is no appeal in this case, on the ground that this information was a criminal proceeding within the meaning of the Judicature Act, 1873, s. 47, and that an appeal in this case was thereby denied, and could not be brought. I shall presently have, to the best of my ability, to go through the various points that have been thus taken; but it seems to me that they all can be best solved by coming first to a decision as to what is the meaning of the Parliamentary Oaths Act, 1866. That Act governs, and will decide, every one of the objections which have been taken on both sides. The material parts of the Parliamentary Oaths Act, 1866, are as follows:—[The Master of the Rolls read the preamble, and the 1st (except the form of oath), 3rd, and 5th sections of that statute.] Some stress has been laid, for certain purposes, upon the exact meaning of the words, "the oath shall be made," and it has been contended that the word "made" is to be construed as if it were different from the word "taken." It seems to me, looking at the preamble and at the manner in which the word is used, that the word "made" has precisely the same effect as if it were "taken," and that whatever might be comprehended in a statute under the word "taken," will be just as much comprehended in this statute under the word "made."

The next question is, whether this oath is to be taken more than once in the same Parliament? That raises the question, what is the meaning in this statute of "in every Parliament?" The phrase in this statute appears to me to mean not merely in the next Parliament after the statute is passed, but in that and every succeeding Parliament. If that be so, then how often is a member to take the oath? The preamble recites that "it is expedient that one uniform oath should be taken by members of both Houses of Parliament *on taking their seats* in every Parliament." The 1st section uses the terms, "the oath to be made and subscribed by members of both Houses of Parliament *on taking their seats*," therefore it seems to me that whenever a member takes his seat, he is to take the oath. It is not enough to say, when he has been elected for a second time in the same Parliament, that he has taken the oath before. The phrase "taking his seat," is to be construed according to the practice and habits of Parliament; and it is well known that when a member is elected or re-elected, he has to take his seat on that election; therefore, whenever he takes his seat, he must "take the oath;" these words being interpreted in the way in which, as I shall presently say, they ought to be interpreted. The oath is to be taken and subscribed. But the 3rd section makes additional provisions: it mentions many matters. The oath provided by the 1st section is not only to be made and subscribed, but is to be "solemnly and publicly made and subscribed." Some meaning must be given to those words. In my opinion—having looked at this matter with great care—"solemnly," as used in the 3rd section, does not mean merely religiously, but it means with all the solemnities that are necessary in order to make it a taking with due solemnity in Parliament. Then the oath is to be taken "publicly" in Parliament. It is not to be taken in a corner of the House, or at a time when nobody can see or know whether it is taken or not. It is to be taken "solemnly and publicly," that is, it is to be taken in the face of the House and with due solemnities. Then the oath is to be "subscribed." Now "subscribed" is a word which cannot be understood until the practice observed in Parliament is known. According to that practice the oath is to be taken at the table in the middle of the House, and whilst a full House of Commons is duly sitting with its Speaker in the Chair. Then the oath is to be taken "at such hours and according to such regulations as each House may by its standing orders direct." Now the standing order is this: "Members may take and subscribe the oath required by law, at any time during the sitting of the

House, before the orders of the day and notices of motion have been entered upon, or after they have been disposed of:" therefore, a new condition is introduced into the 3rd section: "but no debate or business shall be interrupted for that purpose:" that must mean that the oath is to be taken in such a manner that no debate or business be interrupted for that purpose. I take it that the word "interrupted" there does not mean "interrupted by the House;" for the members might stop the business before them if they thought fit; but it means that no debate or business shall be interrupted by the person who is about to take the oath. All these provisions of the standing order are written into the 3rd section of the Parliamentary Oaths Act, 1866. Then I come to the 5th section, which enacts that "If any member of the House of Commons votes as such in the said House, or sits during any debate after the Speaker has been chosen, without having made and subscribed the oath hereby appointed." I thought for some time that that might not include many of the incidents which are mentioned in the 3rd section, but on reflection it seems to me that "the oath hereby appointed" is the oath which is to be taken according to the 3rd section, and therefore, that even although the person who took the oath in form or in fact was a person who could take an oath, and who did in fact intend to take it, yet if he did not take it with the due solemnities and publicly, or if he took it so as to interrupt a debate or the business of the House, he would not be taking the oath appointed by this Act, and would be liable to the penalties if he either voted or sat.

It has been at different times during this argument contended before us on both sides, for different purposes, that the 3rd section of the Parliamentary Oaths Act, 1866, imposes on every member a legal obligation to take and subscribe the oath, and that, if a member does not take and subscribe the oath in the manner therein set forth, an indictment will lie against him on that section alone as for a misdemeanor, and that the penalty in the 5th section is cumulative. That was at one time argued by the Attorney General in order to shew that the acts complained of in the information were criminal, and that no appeal would lie. It was afterwards argued by the defendant in this case that the same construction should be put upon the statute, for the purpose of shewing, at all events, a great hardship, namely, that the 3rd section would put upon him an obligation to take the oath, and that the 5th section, if construed in the way insisted upon by the Crown, would inflict upon him a penalty of 500*l.* for his voting after he had then taken the oath thus forced upon him. I think that the Act of Parliament must be read as a whole, and that the two sections cannot be treated separately; therefore it seems to me that the true construction of the Act of Parliament is that it imposes a new obligation not known to the common law, and that with regard to a non-performance of that obligation it enacts a certain consequence. Wherever an Act of Parliament imposes a new obligation, and in the same Act imposes a consequence upon the non-fulfilment of that obligation, that is the only consequence. Therefore, it seems to me that the only consequence of voting as a member without having taken the oath in the manner appointed is, that the member becomes liable to a penalty. If that be so, no indictment will lie, and, as far as my judgment goes, nothing in the nature of a criminal proceeding can be taken upon this statute. The recovery of a penalty, if that is the only consequence, does not make the prohibited act a crime. If it did, it seems to me that that distinction which has been well known and established in law for many years between a penal statute and a criminal enactment, would fall to the ground, for every penal statute would involve a crime, and would be a criminal enactment. In construing this Act of Parliament I should on that ground alone say that no crime is enacted by this Act. But there is more than that: this penalty of 500*l.* is, in the phraseology of this Act of Parliament, to be recovered "by action in one of Her Majesty's superior courts at Westminster." Now, it may be true to say, as appears from the passage cited from Comyns' Digest (Action D. 1), that in some cases "actions" will include indictments or will include criminal informations. In some cases it may, but the question is whether in this Act of Parliament it does, and when the legislature is found using the words, "by action," that word construed according to its ordinary meaning does not seem to me to include an indictment or a criminal information. But there is more than that. The words are "by action in one of Her Majesty's superior courts at Westminster." Now, a criminal information never was moved except in the Court of Queen's Bench. An information by the Attorney General also was moved in the Court of Exchequer, but that was a procedure for the purpose of recovering a debt, or for the purpose of rectifying a trespass, or for the purpose of dealing with some injury to the Crown in its particular capacity, and not merely as the representative of the public. So that this argument seems to me to shew that by the use of the words "by action," and by the still stronger language "in one of Her Majesty's superior courts", (which mean in any one of Her Majesty's superior courts) at Westminster, this offence cannot be the subject matter of criminal information, and cannot be the subject matter of indictment, and that the only proceeding which can be brought upon the statute, as the House of Lords has now determined, is an information filed by the authority of the Attorney General, and in his name, such as was formerly brought generally on the revenue side of the Court of Exchequer. Now comes the question whether an information by the Attorney General on the revenue side of the Court of Exchequer is or is not a criminal proceeding in any sense. In order to answer this question, we must consider *Attorney General* v. *Radloff.* (1) It is not binding on this Court; it is a case in the Court of Exchequer, and we are bound to exercise our own judgments upon it. It is a case in which the judges were equally divided in opinion, and, therefore, it could not bind any Court, but certainly could not bind this Court. Two of the judges were of opinion that unless there was something very peculiar in the Act of Parliament, such as that it in terms enacted that it was to be a criminal matter, the proceeding on the revenue side of the Court of Exchequer for the recovery of a penalty in the name of the Attorney General was not a criminal proceeding. The other two were of opinion that it was. I will not go into the reasons; the reasons were given by eminent judges on both sides, but, to my mind, if I had been a member of the Court at that time, I should have seen no answer to the reasoning of Martin, B., in that case, and I should have been of opinion in that case that an information for a penalty on the revenue side of the Court of Exchequer could not at any time, unless there were special and

(1) 10 Ex. 84.

clear words in an Act of Parliament saying it was so, be considered as a criminal proceeding. If that be true, then it is said that we are met by the judgment of the House of Lords in *Bradlaugh* v. *Clarke* (1), and that the judgment of the House of Lords, particularly the judgment of Lord FitzGerald, seems to shew that in this Act of Parliament, even though we take the proceeding to be one which is the same as if it were brought on the revenue side of the Court of Exchequer, still it is a criminal matter. Now, that will partly depend on that judgment used as a binding authority, and partly on the argument which has been raised on the terms of this Act of Parliament itself. Reliance is placed on these words: "He shall for every such offence," and it is said that the use of the word "offence" shews that this is considered by the legislature as a crime. What is the offence? The offence is not a refusal to take the oath, it is not a declining to take the oath. What "offence" means in the statute is a voting or sitting without having taken or subscribed the oath. It is possible—I do not think it very probable—that at the beginning of a Parliament a member may sit or vote who from forgetfulness or ignorance has not taken the oath. I mean a member who is in every sense capable of taking the oath, but who accidentally, from forgetfulness or ignorance, sits or votes without taking the oath, without having any intention to break the Act, and without having any intention to do anything forbidden by law. I have no doubt that he would be liable to the penalty, for no question of intent is introduced into this Act of Parliament. Now, to my mind, it is contrary to the whole established law of England (unless the legislation on the subject has clearly enacted it), to say that a person can be guilty of a crime in England without a wrongful intent—without an attempt to do that which the law has forbidden. I am aware that in a particular case, and under a particular criminal statute, fifteen judges to one held that a person whom the jury found to have no intent to do what was forbidden, and whom the jury found to have been deceived, and to have understood the facts to be such that he might with impunity have done a certain thing, was by the terms of that Act of Parliament guilty of a crime, and could be imprisoned. I say still, as I said then, that I cannot subscribe to the propriety of that decision. I bow to it, but I cannot subscribe to it: but the majority of the judges forming the Court so held because they said that the enactment was absolutely clear. (1) Here can anybody say that it is absolutely clear that this offence is to be considered as a crime? and, if it is not absolutely clear, then the doctrine comes in that an act done without an evil intent must not be considered a crime, and that therefore the forbidden act in this statute, made liable to a penalty whether done with or without an evil intent, is not to be a criminal act. Not very long after *Attorney General* v. *Radloff* (2) had been heard in the Court of Exchequer, the legislature passed an Act of Parliament, which certainly, to my mind, seems to have decided the controversy in favour of those judges, who considered that a suit or information for penalties on the revenue side of the Court of Exchequer was not a criminal proceeding, because the legislature applied to such trials rules which are applicable to a civil trial, and which are not applicable to a criminal trial. I am aware that out of delicacy to the judges, or for some other reason, the legislature did not put the statute into the form of a declaratory Act, but it seems to me a strong intimation of their opinion that the informations in the Exchequer were not criminal informations, when they applied to these informations the incidents of a civil trial, and, amongst others, the power of granting a new trial. Now, this case on this point is to be decided, let it be recollected, as if there had been a trial before a single judge; we are not involved in the question of a trial at bar. If it had been tried before a single judge under the old system in one of the courts, if it had been tried before a judge of the Court of Exchequer, there would have been a motion in the Court of Exchequer, in banc if it was alleged that he had misdirected the jury, and the Court could have granted a new trial. A new trial is unknown in a criminal case, so that it is in the strongest way shewn that this proceeding was to be treated as a civil action with all the consequences, even including a right of appeal.

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(1) 8 App. Cas. 354.

Then it was said that the Law Lords, in the case of *Bradlaugh*

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(1) It is presumed that the Master of the Rolls was alluding to *Reg.* v. *Prince*, Law Rep. 2 C. C. R. 154.

(2) 10 Ex. 84.

v. *Clarke* (1), have said that the offence is a crime. My own impression of that judgment in the House of Lords is that the learned Lords did not consider that this was a crime. I desire to speak in terms of respectful admiration of the most subtle and careful and laborious dissection by the Lord Chancellor of the various Acts of Parliament in order to shew that a private party cannot sue, and that the Attorney General alone can sue. Yet Lord Blackburn was of opinion that a private party could. I will presently speak of what Lord FitzGerald is supposed to have said; but if either the Lord Chancellor or Lord Blackburn had thought this was a criminal case, they would not have given any of the reasons which they did, but would have said at once that it was a crime which could not be in England sued upon by any private individual. They would have stopped the argument at once, and said that the suit must be by the Crown. It is urged that an action can be brought for a libel, although the Crown can also prosecute for a libel, that an action can be brought for assault although the Crown can also indict for the assault; but in those actions the plaintiff does not sue for the libel or for the assault as the substantive matter and cause of action: he sues for the injury done to him by the libel or by the assault, and not for the injury done to the public. When a person sues in an action for libel or assault, he does not sue on behalf of the public, or because the public are injured by the libel or assault, or because there was a danger of producing a breach of the peace, which is the ground on which an indictment is founded; but he sues for the injury done to him by the libel or assault. That is the cause of action. That is a ground, for which the Crown cannot maintain the suit and for which only a private person can. Therefore it seems to me that none of those matters afford ground for saying that this is a criminal proceeding. Now, I come to the phrase used by Lord FitzGerald. Of course it is a matter to be considered carefully and respectfully, but to my mind he never could have used the words which he did use, if he had thought that this was a crime. But even although that very learned Lord might have been of opinion that this offence was a crime, his opinion was not the judgment of the House of Lords. I do not like to say that if he

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(1) 8 App. Cas. 354.

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did think the offence a crime, I disagree with him, because I do not think he really did, and taking the whole of these judgments together they do not to my mind shew that in the opinion of the House of Lords this was a criminal matter or a criminal proceeding, but on the contrary, the way in which they dealt with the question seems to me to shew that they were all of opinion that the proper procedure was an information on the revenue side of the Court of Exchequer, or that which is equivalent to it now, that it was not a criminal proceeding, but an action for penalties or that which is equivalent to an action for penalties, namely, an information for penalties, a civil proceeding on the revenue side of the Court of Exchequer. The Law Lords came to the conclusion, that the information on the revenue side of the Court of Exchequer could not under the Act of Parliament be brought by a common informer, but could only be brought before the Court by the Attorney General; it follows from their judgment that it only the Attorney General who can institute a proceeding to recover the penalty; but it is not by their judgment denied, and it seems to me clear, that on the words of this Act of Parliament, although the Attorney General has a prerogative and the right to bring it before the Court by way of information, he might equally well have brought an action of debt to recover the penalty for the Crown, and I agree with the opinion of Martin, B., in *Attorney General* v. *Radloff* (1), that when it is found that the Attorney General can either bring an information in the Exchequer or bring an action of debt, it is inconsistent with the true view of the criminal law of England to say, that by proceeding in one form rather than in the other, he, under the same circumstances, can make in the one case that a crime which in the other can only be treated as a debt. Therefore I am myself clearly of opinion that the proceeding under this Act of Parliament by the Attorney General, although it is a proceeding which could be taken only by him and not by a private individual, is in the nature of a civil proceeding. Even if for some purposes it can be considered as a crime, which I have thus shewn I do not think it can, it seems to me it would not be that sort of criminal proceeding which takes away from this Court under the Judi-

(1) 10 Ex. 84, at p. 98.

cature Act, 1873, the necessity of hearing an appeal. The Judicature Act was dealing with procedure alone, and when the Judicature Act was passed there were forms of civil proceeding such as actions at law and suits in the Court of Chancery, and there were proceedings by indictments, there were criminal informations filed by the Queen's Coroner or by the Attorney General, and there were criminal proceedings before magistrates. It seems to me that the Judicature Act recognised those divisions and intended that those which were clearly criminal proceedings, and were always recognised as criminal proceedings—those which I have enumerated—should not be brought before the Court of Appeal, but that all others should.

Two cases decided in the Court of Appeal itself were cited, in which it was said that proceedings to recover penalties were treated as criminal proceedings. In that which was first cited, *Mellor* v. *Denham* (1), Lord Bramwell really enunciated the decision; three judges were present, of whom he alone gave the judgment. In the first case Lord Bramwell did not at length enter into the detail of the reasons why he thought there was not an appeal. He seems to have been very much touched by the fact, that the matter was of the slightest importance, and that if possible the Court ought not to encourage an appeal. When the second case came on, he said that at the time he gave that first judgment he really was in doubt, which perhaps was the cause of his not giving the reasons for his judgment. In the second case, not only he, but I myself was a party to it; the reason of the judgment of the Court seems to have been given in express terms, and I know that it was debated amongst the judges. In that case it is true that the proceedings were for a penalty, but that penalty was to be recovered or might be recovered before magistrates under Jervis's Act (11 & 12 Vict. c. 43). The procedure was controlled by Jervis's Act. But Jervis's Act did not give any new jurisdiction to justices. It regulated the proceedings of justices in cases which were already within their jurisdiction. Now justices are not judges in civil cases as a rule. It is possible that in some cases they may have to decide a civil dispute, one which cannot be called criminal. But where they have to make orders for payment of money, most of those orders are for payments in respect of that which is considered to be within their jurisdiction as a police matter; and therefore where their order is for the payment of money, nevertheless if it is a police matter, or where their order is an alternative order, which the defendant in this case has shewn is often in this form—that the defendant before the justices is to pay the penalty, and if he does not he is to go to prison—the matter is in point of truth quasi criminal, or a matter which is treated as a criminal matter within the jurisdiction of the justices; and in *Reg.* v. *Whitchurch* (1) that is the very ground given as the reason, why the matter although it is for a penalty, should be treated as a criminal matter in which there is no appeal. It seems to me that these cases do not govern the present; therefore I am of opinion that the right of appeal, which we declare to have existed before, is not taken away by the Judicature Acts, but on the contrary, if it is necessary to say so, it is given by the Judicature Acts. The judgment of the Court at Bar is not a judgment in a criminal proceeding, and therefore by the Judicature Acts an appeal lies against that judgment. If there is an appeal against a judgment, it seems to me that the moment there is an appeal against a judgment, it may be impeached by shewing that it was not properly obtained, or not in a legal way.

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(1) 5 Q. B. D. 467.

Now, it is contended that there can be no appeal on the ground of the verdict having been obtained by misdirection, or by the wrong reception of evidence, because the trial was at bar. It is contended that there is no appeal against the ruling of a Court with regard to the reception of evidence, or against the misdirection of the Court, when there is a trial at bar. I know that it is stated in some of the books that the Court will not listen to a motion for a new trial after there has been a trial at bar, on the ground of misdirection, and that evidence has been wrongly received or rejected. I know that is so stated in the books, but it is also established that the Court in banc will, when they have ceased to be trying at bar, in banc set aside a verdict and grant a new trial on the ground that the jury were misdirected; and I apprehend also if the record on the face of it is bad, motion may be made in

(1) 7 Q. B. D. 534.

arrest of judgment. I am aware that it is stated that the Court will not hear an appeal. I doubt whether that ever has been brought to a judicial test. I doubt whether the Court would say they would not listen to the appeal. I can quite understand the objection, because the very same judges, it being the Court in banc, having already decided the point at bar, would be very unwilling to hear it again and to overrule their own decision; but I confess to having very great doubt whether, if it had been insisted upon as a right, they could not with the additional assistance of further argument consider and determine whether their own decision at the trial at bar was right or wrong, whether they could decline to hear it. But it signifies not, as it seems to me, whether that is true or not; I only put that in by way of protest. I do not understand the doctrine myself, that because judges have once decided a point therefore they would not listen to an argument to shew that they themselves were wrong. If it was one judge who tried a case, formerly there never was any suggestion that he could not sit in the court in banc to hear a motion for a new trial, on the ground of his own misdirection. On the contrary, the judges very often gave unanimous decisions that there had been misdirection or misreception of evidence; the judge, who had misdirected or who had wrongly received evidence or wrongly rejected it, being one of the Court. I do not recognise such a doctrine in the English common law. But, however, that might be, the trial at bar is a trial by some of the judges of the Queen's Bench Division; that is what it is now. The only difference between the trial at bar and the trial before a single judge under the former practice was, that the whole Court sat; there were four judges, and they assisted each other, but otherwise there was no incident of the trial which was different. Here it is a trial by the judges who heard the case, and they are part of the High Court, and when they direct judgment or a verdict to be entered, that is an order of some of the judges of the High Court, and upon such an order, whether it is made at bar or by the Divisional Court, the Judicature Act gives an appeal to this Court unless the matter be a criminal matter. Therefore I think the appeal was well brought in this Court.

Now comes the question to be decided on the appeal. The great and main question is this, whether in this information it can be established, that although the defendant took the oath in form, doing everything at the time and in the manner pointed out by the statutes, he is nevertheless liable to a penalty. The question is whether the defendant can be said to have taken the oath within the meaning of this Act, he being without religious belief.

Now when the Parliamentary Oaths Act, 1866, was passed, the decisions at law were perfectly well known. The decision in the case of *Omichund* v. *Barker* (1) had become history, which must be presumed to have been known to the legislature. We have to consider what does this Act of Parliament mean on the true construction of it, knowing what the state of the law was or had been declared to be at the time when it was passed—what is the meaning of this Act of Parliament when it says that an oath must be taken. Now the jury have found with regard to this point of it:—"We unanimously agree that the defendant had on the 11th of February, 1884, no belief in a Supreme Being:" that is, no belief in a Supreme Being of any denomination. It would seem to me that that finding alone will of necessity raise this point, but then they go on further in answer to a question:—"Have the Crown satisfied you that the defendant on the 11th of February was a person upon whose conscience an oath, as an oath, has no binding force," and the jury said, "Yes, we are satisfied." They have found both. It seems to me that the second finding might be properly predicated or found of a person of whom the first could not be found; but that if the first can be properly found, it is really unnecessary to put the second, because it is quite impossible in the case of a person who has no belief in a Supreme Being, that that which he does can be binding on his conscience *as an oath.* What is the law with regard to that? can a person in that frame of mind, according to the law of England, and according to the intention of this Act of Parliament, take an oath? and whatever he does in form, can that which he does in form, be said to be an oath? Now the law has been accepted and acted upon with regard to that point in accordance with and as governed by the decision given in *Omichund* v. *Barker* (1), ever since that case was decided, and the law has been

(1) 1 Atk. 21.

adopted by every judge who has had to speak of it, really and truly according to the judgment of Willes, C.J., in that case. His has always been taken to be the most prominent and most satisfactory judgment. His judgment is in this form. (1) "I am of opinion that such infidels as believe in a God, and that He will punish them if they swear falsely, may and ought to be admitted as witnesses in this, though a Christian country." Observe the care with which he puts it: "such infidels as believe in a God, and that He will punish them"—he does not say when, where, or how—"if they swear falsely." Now we come to the next: "And on the other hand I am clearly of opinion that such infidels, (if any such there be,) who either do not believe in a God"—that is the first of these findings—"or if they do, do not think"—this is the alternative, that is, although they do—"if they do, do not think that he will either reward or punish them in this world or the next, cannot be witnesses in any case nor under any circumstances." It is not only "in any case," but "nor under any circumstances," for this plain reason, because an oath cannot possibly be any tie or obligation upon them; of course meaning that as an oath it cannot be any tie or obligation upon them. Therefore there is no necessity that the person taking the oath should believe that he will be liable to be punished in a future state. If there be any belief in a religion according to which it is supposed that a Supreme Being would punish a man in this world for doing wrong, that is enough; but if he does not believe in a God, or if believing in a God he does not think that God will either reward or punish him in this world or the next, in either case according to the law of England as here declared a man cannot be a witness in any case, or under any circumstances. "He cannot be a witness." It is true that those words are used, but they are used because the subject matter of inquiry was with regard to a witness. But that same principle, that same law, if there be anything in the reasons given, must apply to the case of any oath, whether the person is a witness or not. The question, whether he was a witness, was logically an accident: the question before the Court was whether the person, although he went through the form of it, could take an oath.

(1) Willes, 549.

Now, the defendant here has relied more than once upon his saying that an oath was binding upon him—binding upon his conscience. In a most admirable book, Phillipps on Evidence, vol. i., ch. 3, p. 16 [10th ed.], although the reference is not one which I can verify, the author lays this down: "It is not sufficient that the witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury." I should add to that, "or from what he considered to be in honour binding on himself." That is not sufficient. The question is, whether he can take an oath. The question is, not whether he is bound in honour; it is whether he is bound by an oath; and that is the decision of Willes, C.J., which has been adopted and recognised in many cases since, particularly in the case of *Miller* v. *Salomons* (1), where the doctrine was acknowledged to be the right doctrine, and acted upon. The question is, whether the state of mind being such as is described in both the cases, the person can be said to have taken an oath at all. It seems to me clear that by the law of England, he has not taken an oath. He may have taken something which binds him according to his own feelings; but that is not what the Act of Parliament requires. It requires an oath; and he has not taken an oath.

If my view as to this point is right, it puts an end to this case, because if the defendant did not take an oath, the question whether he complied with the other parts of the Parliamentary Oaths Act, 1866, is not material. But still I should not desire to let this case go without giving my full opinion on every point, which has been raised with regard to the subject matter of this trial.

I will first of all deal with what should be the kind of evidence, and the time to which such evidence should be applied, of the person being in this frame of mind; and I will afterwards deal with the other matters. It is urged that the answer of the person sued under this Act of Parliament must be accepted as conclusive; and if he says that he believes in a Supreme Being who will punish or reward him either in this world or the next according to whether he has done right or wrong, his answer must be accepted. The Court having come to the conclusion that the state of his mind at the time when he does what he does, is part of the issue of fact, which is to determine the question whether he could take the oath or not, a difficulty is raised on the point whether the Court is to be bound by what he says. It is argued that it is to be bound because when the judge examines a witness at the trial on the voir dire, as it is called, it is said that he is bound by the answer of the witness. But be that as it may—I doubt whether the suggestion is correct—it seems to me that the moment an issue of fact is raised as part of the trial in order to determine the liability at law, it must be decided by a jury on precisely the same rules of evidence, and by precisely the same class of evidence, as any other issue of fact must be tried. Therefore, it seems to me that the parties who assert that the defendant was in a state of mind, which by the law incapacitated him from taking an oath, and endeavour to shew that he could not take an oath and did not take an oath, have the right to prove it by any lawful evidence. Therefore, not only might they give in evidence the admission of the defendant himself, made within such time as can reasonably justify a jury in acting on it—not only can the jury act on his admissions—but they can act on evidence given by other persons. It would be open to the complainants to call witnesses to shew that in their presence, within such time as would justify reasonable men in acting upon it, the defendant, although he himself at the trial denies it, did say such things or do such things as shewed that he could not have believed in a Supreme Being. I think that evidence would have been admissible, and that the only limitation with regard to time is the usual limitation—that it must be not beyond such time as would prevent reasonable men from acting upon it. If it is beyond such a time, the judge has to direct the jury that it was not evidence, and therefore he would not admit it, but there is no other limitation. Then comes the question whether, if in this action the defendant were to asseverate that he did believe in a Supreme Being, that would be conclusive. It is a strange position that, because before the Enabling Act, 32 & 33 Vict. c. 68, s. 4, allowed the defendant to affirm he would have been on this trial of this issue examined on the voir dire to see whether he could be sworn or not; and now, although he can be a witness, and be examined, yet in order to test the question of whether he can be a witness, he has to satisfy the judge that he does not believe in the Supreme Being. I admit the strangeness of the proceeding; but even if he could get into the box, and even if there, in the box, he were to pledge himself that he did believe, still the case must be tried by the jury on the conflict of evidence so raised, and the jury must give a decision on that conflict, just as they do on any other issue of fact so raised. That is my view of the Parliamentary Oaths Act, 1866, and of the trial which has to take place under it. Then it is said that this state of mind of the defendant could not be inquired into, unless the body or persons, before whom he had to take the oath, could have knowledge of and have full cognizance and notice of his state of mind. I can see nothing in this Act of Parliament which so states. I can see no conditions; therefore I must declare my view that if a person were to sit and vote in the House of Commons, after having gone through all the formalities, without having described to the House his state of mind, although the House of Commons had no cognizance of his state of mind at all, yet if afterwards it came to the knowledge of the Attorney-General, by proof upon which he thought it right to act, that that person had sat or voted in Parliament, having gone through all the forms, but having this state of mind, and if a jury should so find, I am of opinion that all these penalties would be incurred, and that the fact of the knowledge by Parliament is an immaterial fact. Of course, what I am saying shews the severity of this Act of Parliament; but I think it better to make clear my own opinion of the consequences of it.

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(1) 7 Ex. 475; 8 Ex. 778.

Now, I come to this suggestion, that the only evidence which can be admitted in such cases, is evidence of the conduct of the defendant either in Parliament or before Parliament. There, again, I can see nothing which confines, in an action under this statute, the evidence to anything of the kind. Suppose nothing has ever been said by the defendant in Parliament at all; yet if from what he has said or done outside Parliament before he was elected or after, the jury upon legitimate evidence will be entitled to find, that when he sat and voted, although he had gone through the forms, he had this state of mind, I am of opinion that the penalty will accrue, because he would not have taken an oath, and had not taken it because he could not.

Now I come to some of the other questions which are not necessary to decide in this case, but which I think it better to give my opinion about, namely, if a person who could take an oath, not being in the frame of mind of the defendant, nevertheless took it in a manner which disregarded the due solemnities of the mode of taking an oath which are appointed in this Act of Parliament, or if he took the oath, and did not, within the meaning of this Act of Parliament, subscribe the oath; or if he took the oath with some of the due solemnities, or with all, what I will call, due solemnities, and did subscribe the oath, but yet, in defiance of Parliament, did it so as to interrupt business, in any of those cases, on reflection, I am of opinion that he would be liable to the penalty; and this will raise many of the questions which have been raised with regard to the reception of evidence in this case. I must guard myself here. Even although there had been misreception of evidence, or a misdirection, yet if that misdirection or misreception in this case only went to these points, but would not affect the judgment of the jury as to the question whether the defendant could or could not take an oath, and did or did not take an oath, we could not in this case grant a new trial, because the one finding of the jury has settled and determined the matter. But would the evidence be properly admitted in the case of a person who could take the oath? Now I have to construe, with regard to what has been done in the House of Parliament—because that is the theatre where all this took place—the meaning of the word "solemnly." Well, upon the face of the Act of Parliament, I am of opinion that it does not mean "religiously," and, as I have said, I think it means "with due solemnities." The moment I come to that the question arises, what is the meaning of "due solemnity," in and before that place which I call the theatre, the House of Parliament. That can only be decided by hearing what are the due solemnities in Parliament. And what are they? The due solemnities are that the member should go up through the House to the table and there do certain acts. He is called to come forward by the Speaker. He must take the oath at a time certainly when it is not out of order to do it. A member cannot be doing a thing with the due solemnities of the House, which by the rules of the House is disorderly and unsolemn. Therefore, if he was breaking the orders of the House, and acting in spite of the House, I should say he could not be doing the thing with the due solemnities. That raises the question, what is the meaning, when the Speaker, under such circumstances, calls "Order, order," to a member? I take the meaning of it to be that he is not to proceed. I care not whether he is to sit down or not. It has been urged by the defendant that he could not sit down, and he said that if a member under those circumstances sat down, his seat would have been thereby vacated. I take leave wholly to doubt that. The seat can only be vacated, as it seems to me, if he sits there during a debate within the meaning of this Act of Parliament, or if he sits and votes, and that it could not be, because he sat down under the circumstances surmised, according to the order of the Speaker. But he has committed a breach of order, as it seems to me. The meaning of the Speaker is, that the member is not to proceed, whether standing there, or sitting down. Whether he ought to have stood at the table, or whether what he ought to have done was to retire immediately behind the bar, is to my mind immaterial; I am perfectly certain that he ought not to proceed, and that he has defied the order of the House—because the Speaker in crying "Order, order," is carrying out the authority of the House, he is acting by authority of the House, and "Order, order," is proved by the evidence to mean that the Speaker is calling the person to order, and is intimating to him that he is doing that which is out of order and is calling upon him to desist. Not only was that the real meaning and intention of the Speaker, but I have not the smallest doubt that the defendant knew that just as well as the Speaker. He went there on purpose to defy the Speaker and to defy the House, which he thought he was justified in doing. Therefore that circumstance of itself would, I think, prevent this from being a taking of the oath appointed.

But then comes the question whether he does not also break the standing order, and whether he does not come within the further words of the statute? He is to take the oath according to the standing order. What is the standing order? Did the defendant interrupt "business"? He did not interrupt "debate," that is quite clear, because no debate was going on; but did he interrupt "business?" What is "business," in the House of Commons? How can that be known without knowing what the practice of the House of Commons is? What is considered "business," in the House of Commons? It is proved in evidence that the rule of the House of Commons is, that when the Speaker stands up and cries "Order, order," no other business is to go on, and the Speaker is then in possession of the House. Sometimes he stands up to inform the House of some matter; there might be a message from the Crown of which he had to inform the House; there might be some resolution of a committee of the House of which he might have to inform the House; and if he was standing up for the purpose of doing that, it is obvious it would be for the purpose of doing some business. If he stands up for the purpose of preserving order, is he then doing "business?" If he is not doing "business," what is he doing? He is doing "business," by the authority of the House. Therefore the House as a body is doing this "business;" it is preserving order, and insisting upon order being preserved by some of its members. That that is the meaning of it, was proved by Sir T. Erskine May. Therefore if the Speaker was standing up, substantially within the meaning of the rules in Parliament, and calling the defendant to order, at that time the Speaker, acting on behalf of the House, was performing the "business" of the House, and the "business" was going on, and the "business" was interrupted. Therefore if a person will do that, he does not "take the oath hereby appointed."

The defendant himself subscribed the oath. What is the meaning of that? "Subscribe" is a general word, but it is to be applied to the practice of the House of Commons. In this Act of Parliament the word does not mean a subscribing of the oath anywhere, it means the subscription which is the subscription of the oath in Parliament. That was proved to my mind, not merely by the production of the Journals, but by the evidence of Sir T. Erskine May—that the mode of subscribing, and therefore the meaning of the word "subscribe" in this Act of Parliament, is this: it is to subscribe a roll, which has been known for years as a Test Roll. What the meaning of the word "test" is, I do not undertake to say; but that is a roll which is subscribed by every member of parliament, and which is produced and kept by the officers of the House, and that is the meaning of subscribing the oath in this Act of Parliament. It is not sufficient for any person to take up a piece of paper and write his name under the oath on that. That is not the meaning of "subscribing" the oath within this Act of Parliament. It must be a "subscription" of the oath according to the ordinary and well known practice of Parliament. Therefore in this case the defendant, even if it could be supposed that he from religious belief could have lawfully taken the oath, but had done with regard to subscribing what he did, would not have taken the oath "hereby appointed," which includes the subscribing of it.

Now to come to another matter, has this oath to be administered? There are no words saying that the oath is to be administered—could he take the oath of his own accord? In my opinion—I do not know whether my learned Brothers agree with me—the oath taken in Parliament is not administered. I am not aware that the House of Commons could "administer" the oath. The oath is "taken." The first person who takes the oath, as I understand it, is the Speaker himself, and it certainly is not administered to him. But it is to be taken. It is to be "solemnly and publicly" taken. What does that mean? It is to be taken in the presence of the House with the ordinary solemnities. To my mind it is not taken with the ordinary solemnities, if it is taken contrary to the express order, and in defiance of the House. The defendant was obliged to admit, as a matter of argument, that his contention must involve that if the Speaker had remained standing up and had in terms the most imperative desired him to withdraw, and had told him in terms that he was out of order in proceeding, he would have a right to take the oath. That is not taking the oath "solemnly," according to the Act of Parliament.

Then the last matter relied upon was the accidental, momentary sitting down of the Speaker. I cannot condescend to go into such a matter. Those who have to deal with business and have to deal with law, look to substance, and if the Speaker accidentally sat down upon his chair for the moment while the defendant was going through the form of taking the oath, or if the Speaker because he could not write standing up, sat down, every one in the House knowing he was sitting down only to write what he was about to say to the defendant, because the defendant had defied him whilst he is standing up, and was continuing to defy him, it cannot be said he is to be considered as not standing up, or that he is to be considered as having sat down to allow the defendant to do that which he could only do when the Speaker is sitting down with the intent of sitting down. It is not an argument which ought to be listened to for a moment.

Therefore it seems to me that there is nothing which can entitle this Court to set aside the judgment of the Queen's Bench Division; there is certainly nothing which can entitle this Court to grant a new trial. I have endeavoured to shew how impossible it is for any member to defy this Act of Parliament and to avoid doing anything required by it without subjecting himself to the penalty. It is impossible to evade or escape any one of the steps; not by any artifice, not by any subterfuge, not by any force, can he absolve himself from performing every part of that which is enunciated as necessary to be done in order to avoid the penalty, and he cannot do that whether with the knowledge of the House or without it, or with the assent of the House or without it. The moment it comes to trial before a Court, which has to deal with this Act of Parliament and with that alone, he becomes subject to the penalty if he has disobeyed or disregarded the statute, and he would be subject to the penalty whatever the House of Commons may have done. If the House of Commons were not to refuse to allow him to sit, even if they passed a resolution allowing him to sit, whatever the House of Parliament might or might not do, no Court in this kingdom has any power or authority to give any opinion on what the House within itself has done. Equally the Court are not bound in any manner when they are administering the statute or the common law of this country by anything which Parliament has done within itself. They are neither bound by what it has done nor entitled to observe on what it has done or what it has not done. They must act upon the law as enacted by this Act of Parliament, and whatever the House may or may not have done, unless the member has fulfilled every part substantially and within the meaning of the Act of Parliament, he will be liable to the penalty, and the Court will be bound to say so. I think, therefore, this judgment was right, and must be affirmed.

Cotton, L.J. This was an appeal from a judgment of the Queen's Bench Division, on an information by the Attorney General to recover some penalties under the Parliamentary Oaths Act, 1866. Two preliminary objections have been taken, which I will say very little about. The first was that this was a criminal case, and that, therefore, under s. 47 of the Supreme Court of Judicature Act, 1873, we could not entertain it. At the close of the argument on that preliminary objection, both the Master of the Rolls and Lindley, L.J., considered that that preliminary objection could not be sustained. I think the question admits of doubt. The question is not whether the act in respect of which the information is brought is a criminal act, whether it is a crime, but whether it is a criminal "cause," not "matter," because "matter" only refers to some proceeding before the Court, not in a cause. There is no doubt a great deal in the argument that at the time before the Judicature Act, 1873, was passed, there was under the Crown Suits Act, by reference to the Common Law Procedure Act, 1854, an appeal, and it would be a strong thing to say that s. 47 of the Judicature Act, 1873, had taken away an appeal in such a case. I wish to express no opinion upon it further than to say, that though I do not differ from the opinion expressed by my learned Brother the Master of the Rolls (Lindley, L.J., takes the same view), yet I have considerable doubt on the question. If our view of the appeal on its merits had been other than what it is, I should have desired time to consider whether this objection was or was not good; but under the circumstances I do not think it necessary. The other objection was this, that there having been a trial at bar, no order could be made, according to the practice of the Court, for a new trial in the Court below, and therefore there ought to be no appeal.

I am satisfied that s. 19 of the Judicature Act, 1873, does give a right of appeal to this Court from every judgment or order of the Queen's Bench Division; therefore an appeal will lie from the decision on a motion for a new trial, and not only on the motion in arrest of judgment; and when there is an appeal from the judgment, then under Order LVIII., r. 5, we can, if on hearing that appeal we think it right for any reason so to do—either for misdirection or misreception of evidence, or exclusion of evidence—direct a new trial. So that on the appeal from the judgment, the Attorney General having very rightly waived all technical objection, all the matters which come before this Court, and have been urged by the defendant, can properly be disposed of.

I shall take first the argument that there was misdirection, and also the objection to the fifth count. It is really the substantial question in this case. The Lord Chief Justice laid down, in accordance with what I consider to be the law, what was necessary in order to constitute an oath; and the fifth count does state in terms that the defendant was a person who had no belief in a Supreme Being, and a person upon whose conscience an oath, as an oath, had no binding force. I need not go through the remainder of it, because if that is proved it does shew that he has not complied with the provisions of the Parliamentary Oaths Act, 1866. The 5th section I take alone for the present purpose. That clearly says that if any member of the House of Commons, without having made and subscribed the oath hereby appointed, shall sit during any debate after the Speaker has been chosen, then he is liable to the penalty here sued for. What is meant by "make oath?" It must mean, make that which is recognised by the law of England as an oath. Parliament undoubtedly is speaking with reference to the well-established law of England and the law of England undoubtedly is this, that if a person is in the unhappy position of not believing in a Supreme Being, or not believing that there is a Supreme Being who will punish for the offence of telling an untruth—it is immaterial whether it is in this or in a future world—then the person who is in that state does not, though he goes through the form of taking the oath, take that which the law of England recognises as an oath. The Master of the Rolls has referred to the case of *Omichund* v.

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Barker (1), and to the law as there laid down. In that case what the judges had to decide was this, what was the essence of an oath according to the law of England. Lord Coke, 3 Inst. 165, had laid it down that none but a Christian man—those are not his words but the meaning of his words—could take an oath. That came before the judges in *Omichund* v. *Barker* (1), where the person who had taken the oath was a Hindu believing in a Supreme Being, but not a Christian. They had to consider therefore what was the essence, in the law of England, of taking an oath and they laid it down in the terms which the Master of the Rolls has read; I will not repeat them. Those observations are pointed, when one considers the occasion on which it came before them. The objection was that none but a Christian can in the courts of law or according to English law, take an oath. The judges said it was not necessary to be a Christian, but by the law of England the essence of an oath is that, which is stated in the passage read by the Master of the Rolls. In the case which has been referred to of *Miller* v. *Salomons* (2), Martin, B., after referring to that case as correctly stating the law, says this: "The doctrine laid down by the Lord Chancellor and all the other judges was, that the essence of an oath was an appeal to a Supreme Being in whose existence the person taking the oath believed, and whom he also believed to be a rewarder of truth and an avenger of falsehood, and that the form of taking an oath was a mere outward act not essential to the oath." I read that because it shews how, down to the latest times, what was laid down in *Omichund* v. *Barker* (1) has been recognised, as we recognise it, as correctly stating what the law of England is, as regards taking an oath. It was said that there were various reasons why, in the construction of the Parliamentary Oaths Act, 1866, we should not consider that what was required to be taken was an oath according to the definition of what an oath is, as laid down in *Omichund* v. *Barker* (1), and by Martin, B. I think that the answer to be given is this. The law there laid down is in no way limited to witnesses in courts of justice. It lays down what the essence of an oath is, and if any one is required by statute to take an oath, he must take it with the incidents there stated. But then it was urged

(1) 1 Atk. 21.

(2) 7 Ex. 475, at p. 515.

(and this I think was the principal point relied upon by the defendant), that the Parliamentary Oaths Act, 1866, requires all members of parliament to take this oath; therefore whatever may be their belief or disbelief, this statute qualifies them to take the oath. In my opinion that argument is not well founded. What the statute really says is this, not that every member of parliament shall take the oath, but that every member of parliament who acts as such in the way which the 5th section mentions without having taken the oath, shall be subject and liable to a penalty. The statute therefore does not require every member to take the oath, but enacts that if he does certain acts as a member of parliament without having taken that oath, then he shall be subject to this penalty. It does not qualify a person who is incapable of taking an oath to take it, but only provides that, if he is in the unfortunate position that he cannot according to the law of England make oath, he cannot act as a member of parliament without vacating his seat, and without incurring the penalty. But the defendant referred to various other matters, and amongst others he referred to the oath of allegiance; and he said every subject with certain exceptions can take the oath of allegiance. I will only refer to what was said by Martin, B., in the same case of *Miller* v. *Salomons* (1); he answers it in a word: "The only oath imposed by the Common Law upon the subjects of this realm is the oath of allegiance, which originated in the old feudal oath of fealty, and this oath all persons capable of taking an oath at all, can lawfully take." So that the learned judge points out that although there is an oath of allegiance which the common law requires, yet it can be taken only by those persons who can take an oath. Then the defendant refers to certain Acts of Parliament which I think it may be as well to refer to, so as to shew that matters have not been passed over. First, he referred to 1 & 2 Vict. c. 105; but that statute assumes that the oath is taken according to the law of England, and that the person who takes the oath has declared that the form of oath is binding on him. That, therefore, is merely to deal with the form and not with the substance of an oath. The other statute, to which the defendant referred, was 30 & 31 Vict. c. 75. That statute was not intended to alter the character of an oath. The argument was, that the oath under that Act is to be no test of religious belief; therefore that he who has no religious belief at all can do that which the law of England says he cannot do, namely, effectually take what the law will recognise as an oath. That Act was to prevent certain objections being made to believers who did not belong to the Established Church, or who did not come within certain definitions, and it was to prevent any objection being raised to a Roman Catholic, in consequence of his form of religious belief; it was not in any way to alter that, which has been established by the law of England to be essential and necessary in order to make a valid oath. In my opinion, therefore, the direction of the Lord Chief Justice was right. The fifth count does not shew that because the defendant is a person of no religious belief he is punishable by the law of England, but it does shew that what was done by the defendant when he said and wrote down the words of the oath, was not a compliance with the section of the statute; that he became liable to the penalties referred to and imposed by that Act, because he was not capable on the statement of this fifth count, and on the direction of the Lord Chief Justice, of doing that which he purported and attempted in form to do, namely, to take the oath required by the 5th section; and then if that is so, penalties follow, and that is the only question we have to deal with in this action.

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(1) 7 Ex. at p. 523.

That disposes of a very large portion of the objections which were taken by the defendant to the evidence that was admitted. Undoubtedly if he was right in contending that notwithstanding he had no religious belief, he could effectually take the oath under this statute, and therefore not be liable to the penalty for having voted, this evidence as to his religious belief which was given was wrong; but if the fifth count does state grounds for saying he incurred a penalty, then the evidence on the whole was right. There are some points in which the defendant objected to evidence, to which it may be well shortly to refer. Evidence was given as to what he did in May, 1880, when he came to affirm under an Act to which I must refer, and of what he said before the committee of the House of Commons, and the principal objections as I understand to both of those heads of evidence was that the Crown had no right to inquire into anything which was done before the defendant was elected to this Parliament by the last election; that is, in my opinion, entirely wrong. We are inquiring, as a matter of fact, into this question, did he or did he not at the time he went through the form which he did go through, effectually according to the law of England make an oath? And any evidence, from which a reasonable conclusion can be drawn that he did not at the time entertain that belief which was necessary to enable him to make an effectual oath, was admissible. If evidence of what he said twenty or thirty years ago had been adduced, then the judges would have said the jury cannot reasonably infer from that, that this was his state of mind in February, 1884. But the facts relied on occurred in 1880, and that was primâ facie strong evidence that that was his state of mind, and there was strong evidence therefore as to what was his state of mind in February, 1884. Then one of the defendant's objections was this, that he did state in the answer to the committee that he considered that this oath would be binding upon him, and that this Court must accept his statement and not inquire into anything further. That, in my opinion, is wrong. When we are considering whether as a matter of fact he could or could not, and whether he did or did not make what is an oath, we must look at all the evidence before us and at his statements, and although he did state that which he relied upon, yet other statements were made by him which shew that he thought it would be binding upon him only because he would not make a promise which he did not intend to keep, and because it was a promise with a statutory obligation, but that he did not look upon what he did as a promise involving the calling a Supreme Being to witness, nor that he believed that that Supreme Being would punish him if what he said was false. Therefore, although when a witness is called, if he says, "I am willing to swear and I consider this oath binding upon me," he may be admitted as a witness; yet when we have to consider the fact whether or not he can make oath, we must not look to one answer only which he gives, but look at the other answers and also to all the other facts in the case; as to which I will not repeat what the Master of the Rolls has said, but will only say that I agree.

That really disposes of the main part of this case, which is undoubtedly important. But I think it would be wrong, as we have had the case fully discussed, not to add a little on some other parts of this case, and I will do it very shortly.

The main point remaining, I think, seems to be this, whether or not s. 5 of the Act of Parliament can be treated by itself. One of the arguments was this, that the 5th section only requires the oath to be made and subscribed, and that that does not in any way imply those incidents which are imposed by the 3rd section. That argument really, in the view which I entertain of the question of misdirection as to religious belief, and of the fifth count, is not material for the decision of this case, because the law as to this point would justify the verdict and judgment as against the defendant. Under those circumstances, it would be wrong even if evidence had been admitted which was not material to the real question, to direct a new trial. But let us see whether we can possibly read s. 5 independently of s. 3, the latter directing the way in which the oath is to be taken, and s. 5 imposing a penalty. If we are to sever s. 5 entirely from the previous sections of the Act, it might be that the oath might be taken and might be subscribed by a member in his own house, because, if the only requisition is that the member shall have made and subscribed "the oath hereby appointed," and if we are not to look at the other portion of the Act of Parliament, but merely to look at that section, it would lead to enormous inconvenience—one would almost say to absurdity—for a member might take the oath at any time, and he might subscribe it in any manner or place he thought fit. Of necessity one must say that the oath must be taken before the House, and it must be subscribed in such a manner that the House could recognise it; and we must not, in my opinion, take that section by itself, but refer to s. 3, and see then what that section requires. Now it was urged that this section, even if it were to be read with s. 5, does not introduce anything except standing orders of the House. But the Attorney General did not rely upon the practice of Parliament as throwing upon the defendant any new statutory obligations other than those which s. 3 puts upon him, but he relied upon it merely for the purpose of ascertaining what the standing orders mean, and what the previous part of s. 3 means. Now as regards the expression "to be subscribed," it is to my mind perfectly clear that in order to see whether that provision of the statute has been complied with, we may go into what is the practice of Parliament. When one finds that the mode of subscribing adopted and acted upon by the House is, that there shall be a roll called a test-roll signed after the oath has been taken, then, in my opinion, we ought to know that, and we ought to hold that unless that roll was subscribed, it would follow that although the oath had been taken, yet the second requisition of subscription had not been complied with. Then, as regards the oath being solemnly and publicly made, the object of that provision, in my opinion, is to prevent the oath being taken surreptitiously. It is to provide that the oath shall not be taken in a secret manner, but shall be taken in accordance with those rules which have been provided by the House, in order to secure publicity and solemnity, so that the ordinary course of the House may be followed in making the oath as well as in subscribing it.

Having expressed my opinion on the main points of this case, I will not go further into the more minute points, but one other point deserves mention. It was said that there is a limit to the time at which the evidence of a witness can be objected to on the ground that he has not properly taken the oath. But why is there to be a limit? The present action is dealing with a different matter. Here the Act of Parliament has subjected the person who does certain acts to a penalty, and we must inquire, in any action which is properly brought before us, whether in fact he has or has not subjected himself, by the act which he has done, to that penalty. But in an action between parties the primary object is to settle between them what are their rights in the action, and there it is quite right that there should be a limit to the time during which either party can object to the verdict and the judgment, so that they should not be able to say after great length of time, that the oath was not properly taken, and that all that had gone before should go for nothing. The matter is entirely different. There is no analogy between the time when an objection can be taken in one case, and the time and manner in which it shall be taken in the other. As regards the essence of what an oath is, the law as laid down when it arose in the case of a witness, is, in my opinion, equally applicable to the present case of this Act of Parliament, and, in my opinion, the defendant, although he said the words of the oath, and although he did sign a piece of paper with those words written upon it, has not done what the Act of Parliament requires, and under those circumstances the Act of Parliament subjects him to the penalties for which he is sued.

LINDLEY, L.J. A great number of questions raised in this case appear to me to be so free from difficulty that I shall not allude to them, especially as they have already been exhaustively dealt with. I shall confine my observations to the few points which present any difficulty. The first matter which I will consider is, whether there is any appeal from the decision of the Court below. It was said there was no appeal because the trial was at bar. Now, when we look into the Judicature Act, 1873, s. 19, it appears to me that this point is untenable. There is an appeal from any judgment or order of the High Court, unless it falls within some of the classes to which I shall have occasion to allude presently with reference to the second objection, but there is nothing whatever to cut down the general language of that section so as to confine the right of appeal to a trial by a single judge. It is perfectly obvious, from the language of that section, that an appeal does lie from a trial at bar. Then if an appeal does lie, the appeal would be regulated in this Court by Order LVIII., which applies to appeals, and in a proper case we should have power to grant a new trial. It does strike me, as the Master of the Rolls has said, that by an oversight we made a slip in allowing this case to come on without a notice of motion by way of appeal, which would be the more proper form of an appeal from a trial at bar. That is put right. It is a mere matter of form, and I merely mention it in order to avoid misapprehension in future.

Now the next point was that no appeal would lie, because this was a criminal cause within the true construction of s. 47 of the Judicature Act, 1873. Up to a certain point it did appear to me that the argument of the Attorney General had considerable weight; but we are not considering the abstract question whether this is a criminal matter or a civil matter. We are considering whether there is an appeal, and there are matters which are on the boundary line which divides civil from criminal matters, and this is one of them. But this difficulty is removed by the provisions of the Crown Suits Act, 1865. Let this proceeding be called criminal, still it is a criminal one in which an appeal is given by that statute; and when we look through the Judicature Acts and the various sections relating to appeals, not the slightest indication is to be found anywhere in the Judicature Acts of any intention on the part of the legislature to deprive suitors of appeals, in cases which were previously made civil proceedings for the purposes of appeal: such cases at all events do not fall within the language of s. 47. But for the provisions of the Crown Suits Act, 1865, I should have had more doubt than I have: but having regard to those sections, and principally 31, 34, and 35, it appears to me that an appeal does lie.

I pass now to the merits between the Crown and the defendant, and I will take the arguments upon the first and fourth counts first of all, and I will assume, for the purpose of dealing with them, that the defendant here was a person who had a belief in a Supreme Being, and could therefore take the oath prescribed by the Parliamentary Oaths Act, 1866. Upon that assumption I will investigate the question, whether he took the oath in the manner required by the Act and by the standing orders. The jury have found as a fact that he did not, and he complains of their finding; but I think that the jury were perfectly right. It is impossible to understand either the 3rd section of the Act or the standing order without reference to the unwritten practice of the House. For example, what is meant by "the sitting of the House?" What is meant by "the order of the day?" What is meant by "A full House?" What is meant by "the Speaker being in his chair?" Above all what is meant by "solemnly and publicly" with reference to the making and subscription of an oath in the House of Commons? and what is meant by "interrupting business of the House?" We must have evidence of the meaning of those expressions before we can understand the Act of Parliament or the standing order applying to it. It appears to me, therefore, that evidence on those points was absolutely essential in order to give effect to this Act either one way or the other. The evidence was objected to, but for the reasons I have shortly given, and for those given more at length by the Master of the Rolls and Cotton, L.J., it seems to me that that evidence was admissible and necessarily admissible. I will not go through the various points of detail in order to shew, why I think the jury were justified in coming to the conclusion that they did. One point is to my mind perfectly established, and that is that the oath was not subscribed in the manner required by the law. That one point alone is quite sufficient to uphold the verdict. That was not the only point on which the Act was not complied with. I concur with the Master of the Rolls and Cotton, L.J., in thinking that the oath was not solemnly made and subscribed as required by the Act and the standing order. Therefore even if the defendant had that belief in a Supreme Being which I have assumed, it appears to me that in conducting himself as he did he incurred the penalties which have been recovered by the verdict.

I pass now to another matter which is totally different. The question as to the defendant's ability to take the oath arises on the counts which I have considered, but more prominently on the fifth count, which raises the main legal question in controversy between the Attorney General and the defendant. That question is extremely important. It is a constitutional question, and it is simply whether persons who have no belief in a Supreme Being can lawfully sit and vote in Parliament, and whether if they do sit and vote they are liable for penalties. That is the great question which we have to consider. I shall not read the sections of the Parliamentary Oaths Act, 1866, again. I concur in the observations which have already been made. I think it impossible to read s. 5 without reference to s. 3 also. I will state very shortly my reasons for holding as a matter of law that an oath implies a belief in a Supreme Being. The case of *Omichund* v. *Barker* (1), the discussion in *Miller* v. *Salomons* (2), and, coupled with those decisions, the fact that we have a series of Acts, some relating to oaths and some relating to solemn declarations, appear to me to render that question quite clear. An oath is not in

(1) 1 Atk. 21.

(2) 7 Ex. 475; 8 Ex. 778.

point of law synonymous with a solemn declaration, and still less with an empty form of words. An oath means what was explained by the Lord Chief Justice in his summing-up to the jury, and I am unable to come to any other conclusion. The fifth count avers that the defendant had no belief in a Supreme Being when he purported to take the oath. That is a question of evidence, and again, for the reasons which have been given by the Master of the Rolls, it appears to me that there was ample evidence to go to the jury, and that the verdict on this point was quite right. I should have been very much surprised if the verdict had been for the defendant. Therefore it comes to this, that the defendant could not take, and did not take, the oath: and he did not because he could not comply with the statute. From this point of view it becomes unnecessary to allude to one of the questions which the defendant raised, namely, the fact that the House prevented him from making and subscribing the oath otherwise than he did. Upon that point I see no reason whatever to differ from the judgment of the Court below. As he was a person who could not take the oath, this point does not arise, and I pass it over.

I come now to what has struck me as the main argument of the defendant. He contended that it was absurd to hold that a man is by law unable to do what the law requires him to do, and that as the defendant was required by the statute to take the oath, an ability to take it must be ascribed to him, and cannot be inquired into. That was really the grand argument which he addressed to us. I agree in the absurdity, but not in the argument deduced from it. If the statute required every person elected to serve in Parliament to take the oath and serve, and if the defendant were criminally prosecuted by indictment or information, or were sued for penalties for not taking the oath and not serving, the absurdity would arise; but the defendant would, it appears to me, be absolved, not by ascribing to him an ability to take the oath which he did not possess, but by holding that as he could not take the oath, he could not be properly elected or prosecuted, and that the statute did not apply to him. He could not be properly elected, nor indicted, nor convicted. That appears to me to be the way in which the judges in *Miller* v. *Salomons* (1) dealt with a similar argument and a similar alleged absurdity. That seems to me to be the way in which similar arguments have been dealt with before, for there are cases, such as *Harrison* v. *Evans* (2), which arose out of the Corporation Act of Charles II., 13 Car. 2, st. 2, c. 1, in which a similar difficulty was pressed upon the Court. Now the difficulty really does not arise in this case. As regards the argument (for it was a branch of this argument and only an exemplification of it) founded upon the oath of allegiance, the same observations which I have made would apply to that. But there is this additional observation, that it is no longer true that every natural-born subject, with one or two exceptions, can be required to take the oath of allegiance. The law has been altered in that respect by s. 9 of the Promissory Oaths Act, 1868, and therefore the difficulty supposed to arise on the law of allegiance, which was a technical difficulty and a logical difficulty, cannot arise, and is gone.

The argument of the defendant now under consideration appears to me to be founded upon a misconception of what the Parliamentary Oaths Act, 1866, does. This Act imposes upon him a penalty for sitting and voting unless he takes an oath. Now the whole foundation of the argument assumes that he could in some way or another be prosecuted, if he did not sit and vote, and take the oath to enable him to do so. But there is no such duty. The only statutes that I know of, which refer to this matter, are 5 Ric. 2, st. 2, c. 4, and 6 Hen. 8, c. 16, and under those statutes a person unable by law to take the required oath could not be prosecuted for not taking the oath, and still less for not attending Parliament, when he was ready and willing to attend and serve. The argument, therefore, seems to me to have no foundation.

The position of the defendant is somewhat curious, for although the defendant is incapable of sitting and voting by reason of the Parliamentary Oaths Act, 1866, and although he is liable to penalties if he does sit or vote, whether he goes through the form of taking the oath or not (that is the conclusion to which I have arrived), still he is for some purposes a member of parliament, and is entitled to some of the privileges of that position: see Sir T. Erskine May's Treatise on Parliamentary Practice, bk. 2, ch. 7, p. 216 [9th ed.].

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(1) 7 Ex. 475; 8 Ex. 778.

(2) 3 Bro. P. C. 465.

One more point which I will notice is this: the defendant pressed upon us an argument based upon 1 & 2 Vict. c. 105, to remove doubts as to the validity of certain oaths, and also another Act of Parliament, 30 & 31 Vict. c. 75, and more particularly s. 5; but the whole argument based upon those statutes is met by the observation that the statutes assume that an oath can be taken, and they only apply to persons who can take an oath. I cannot read those Acts of Parliament as applicable to persons who cannot take an oath at all. They seem to me, therefore, to have no bearing upon the point.

The conclusion, therefore, to which I have arrived is this, that if the defendant's arguments were to prevail, and if every member, who uttered the words in the form of the oath required to be taken, were to be held to be capable of taking them as an oath, the oath would be reduced to a meaningless form. For some reason an oath, or, to meet the scruples of some persons, a solemn declaration, is required to be made; and whatever the object may have been, the effect is, as I understand it, to exclude from sitting and voting in Parliament all those persons who, like the defendant, cannot lawfully make a declaration and who cannot take the oath, and to render them liable to penalties if they do sit and vote.

Now it is said that was never contemplated. That is another argument which we have heard. I really do not know whether it was contemplated or was not, but it appears to me that I must hold judicially that the statute has that effect. Whether it was contemplated or not, may be a matter of some speculation. But I am by no means sure, and I certainly am not in a position judicially to hold, that it was not contemplated. This oath was imposed quite within recent years—I mean in its present form—and there seems to have been some reason for requiring it. It is a mistake to suppose—and I think it is as well the mistake should be known—that persons who do not believe in a Supreme Being are in the same position legally as those who do. There are old Acts of Parliament still unrepealed, under which such unbelievers can be cruelly persecuted. Whether that is a state of the law which ought to remain or not, is not for me to express an opinion upon; but having regard to the fact that these Acts of Parliament still remain unrepealed, I do not see my way to hold judicially that this oath was not kept alive by Parliament for the very purpose, amongst others, of keeping such unbelievers out of Parliament. The statutes, to which I refer, are 29 Car. 2, c. 9, 53 Geo. 3, c. 127, and 9 Wm. 3, c. 35 (amended as to Unitarians by 53 Geo. 3, c. 160). It appears to me, therefore, that the appeal must be dismissed.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor to the Treasury.*

J. E. H.

1884
Oct. 25.

[IN THE COURT OF APPEAL.]

BRYSON *v.* RUSSELL.

Constable—Notice of Action—Trial in County, where Fact committed—1 & 2 *Wm.* 4, *c.* 41, *ss.* 5, 19—2 *&* 3 *Vict. c.* 93, *s.* 8—*Contagious Diseases* (*Animals*) *Act,* 1878 (41 *&* 42 *Vict. c.* 74), *s.* 50.

An officer of police, appointed under 2 & 3 Vict. c. 93, s. 8, who is sued for anything done in intended pursuance of the duties imposed and powers conferred upon him by the Contagious Diseases (Animals) Act, 1878, s. 50, is not entitled by virtue of 1 & 2 Wm. 4, c. 41, ss. 5, 19, to notice of action and to have the action tried in the county where the alleged grievance has been committed; for, although 2 & 3 Vict. c. 93, s. 8, incorporates 1 & 2 Wm. 4, c. 41, nevertheless the protection afforded by s. 19 of the last-named statute extends by force of s. 5 only to those cases, where a constable appointed under it is intending to act with the power and authority given to a constable by the common law or by some statute existing when 1 & 2 Wm. 4, c. 41, was passed.

Action for converting, detaining, and seizing certain cattle of the plaintiff, whereby he suffered damage. Place of trial, county of Northumberland.

The defence, par. 2, alleged, amongst other averments, that the defendant was a superintendent of police for the county of Cumberland.

Par. 4. "The defendant further says that the acts complained of were committed by him in the execution and in pursuance of the Acts 1 & 2 Wm. 4, c. 41, and 2 & 3 Vict. c. 93, as well as under and in pursuance of the Contagious Diseases (Animals) Act, 1878, and this action has not been laid in the county where the said acts were committed, namely, in the said county of Cumberland, and no notice in writing of the said cause or causes of action was given to the defendant one calendar month before the commencement of the said action pursuant to the said first-mentioned statutes."

Reply, par. 2. "With regard to the 4th paragraph of the statement of defence, the plaintiff denies that the defendant was entitled to have this action laid in the county of Cumberland or to have notice of action given to him, as alleged in the said paragraph."

The point of law raised by the reply on the 4th paragraph of the defence was set down for hearing under Rules of the Supreme Court, 1883, Order XXV., r. 2, and the judges of the Queen's Bench Division (Day and Smith, JJ.), held that the fourth paragraph of the defence must be struck out. The defendant appealed.

R. O. B. Lane, for the defendant. The question arising upon this appeal is whether an officer of police, who must be assumed to have committed a mistake whilst he was acting in pursuance of the Contagious Diseases (Animals) Act, 1878 (1), is entitled to

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(1) 1 & 2 Wm. 4, c. 41, is intituled "An Act for amending the Laws relative to the Appointment of Special Constables, and for the better Preservation of the Peace," and enacts by s. 5 that "Every special constable appointed under this Act shall, not only within the parish, township, or place for which he shall have been appointed, but also throughout the entire jurisdiction of the justices so appointing him, have, exercise, and enjoy all such powers, authorities, advantages, and immunities, and be liable to all such duties and responsibilities, as any constable duly appointed now has within his constablewick by virtue of the common law of this realm or of any statute or statutes."

Sect. 19. "And for the protection of persons acting in the execution of this Act, be it enacted, that all actions and prosecutions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the fact was committed, ... and notice in writing of such cause of action shall be given to the defendant one calendar month at least before the commencement of the action."

2 & 3 Vict. c. 93, is intituled "An Act for the Establishment of County and District Constables by the Authority of Justices of the Peace," and recites 1 & 2 Wm. 4, c. 41, and also a subsequent Act of the same reign, and enacts by s. 8 that "the chief con-

notice of action and also to have the action tried in the county in which the plaintiff's grievances are alleged to have happened. The judges of the Queen's Bench Division have held that he is not entitled to this protection. By s. 50 of the Contagious Diseases (Animals) Act, 1878, various duties are imposed upon constables in order that the provisions of the statute may be fully carried out, and the defendant was intending to act under the powers of that section when the alleged cause of action arose. The defendant is a superintendent of police for the county of Cumberland, and was appointed under 2 & 3 Vict. c. 93: that statute recites 1 & 2 Wm. 4, c. 41, and by s. 8 enacts that a constable thereby appointed is to have all the powers of a constable acting under any statute made or to be made, and that every provision of the recited Act "shall be deemed to extend to the constables appointed under this Act," with certain immaterial exceptions. 1 & 2 Wm. 4, c. 41, relates to the appointment of special constables, and by s. 5 invests them with all the powers, authorities, and immunities pertaining to a constable by the common law or by any statute; and by s. 19 it enacts that if any person is sued for anything done "in pursuance of this Act," the action shall be laid in the county where the fact shall have been committed and notice of action shall be given. The judges of the Queen's Bench Division have held that the protection given by s. 19 of 1 & 2 Wm. 4, c. 41, extends only to acts which were intended to be done under the powers of that statute, and that a constable appointed under 2 & 3 Vict. c. 93, is entitled only to the same protection to which

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stable and other persons so appointed shall be sworn as constables before a justice of the county, and shall have all the powers, privileges, and duties throughout the county, and also in all liberties and franchises and detached parts of other counties locally situated within such county, and also in any county adjoining the county for which they are appointed, which any constable duly appointed has within his constablewick by virtue of the common law, or of any statute made or to be made: and every provision of the first recited Act shall be deemed to extend to the constables appointed under this Act, except as to the manner of their appointment and dismissal, the time for which they shall serve, and the manner in which their allowances shall be paid, or as to any matter herein expressly otherwise provided."

By the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), s. 50, various duties are imposed upon constables in order to effectually carry out the provisions of the statute.

he would have been entitled if he had been appointed a special constable under 1 & 2 Wm. 4, c. 41. This decision was erroneous: a constable appointed under 2 & 3 Vict. c. 93, is entitled to the protection created by s. 19 of 1 & 2 Wm. 4, c. 41, whenever he is discharging any duty imposed upon him by any statute then passed or to be thereafter passed. For the defendant it must be admitted that upon the argument for him the words "this Act" in 1 & 2 Wm. 4, c. 41, s. 19, must be read as extending to and including the Contagious Diseases (Animals) Act, 1878; but this interpretation must be adopted, in order that constables may be fully protected in the discharge of their duties.

E. Ridley, for the plaintiff, was not called upon to argue.

BRETT, M.R. The matter before us depends wholly upon the grammatical construction of the English language. We must take it that a constable appointed under 2 & 3 Vict. c. 93, has the protection of 1 & 2 Wm. 4, c. 41, for some purposes; but he has to perform certain duties under the Contagious Diseases (Animals) Act, 1878; and the question is whether he is protected by 1 & 2 Wm. 4, c. 41, for an act done by him in pursuance of the Contagious Diseases (Animals) Act, 1878. The protection given by s. 19 of 1 & 2 Wm. 4, c. 41, extends only to things done "in pursuance of this Act:" can these words apply to an act done in pursuance of the Contagious Diseases (Animals) Act, 1878? The word "this" is important, and must receive an idiomatic interpretation: it comprehends all things done in pursuance of 1 & 2 Wm. 4, c. 41, and it means to refer to all acts which a constable might do by virtue of the common law or of any statute existing at the date of passing that statute. The limits of a special constable's authority are defined by s. 5. If the legislature had enumerated all the offences in respect of which a special constable was to be protected by 1 & 2 Wm. 4, c. 41, s. 19, the enumeration would be found to include all the offences, for which he might arrest either with or without warrant, or as to which he might otherwise act by virtue of either the common law or of any statute then existing; but this enumeration would not include offences against the Contagious Diseases (Animals) Act, 1878; that class of offences would necessarily be excluded from the enumeration, and therefore a constable appointed under 2 & 3 Vict. c. 93, who commits a mistake in the discharge of his duty pursuant to the Contagious Diseases (Animals) Act, 1878, is not protected by 1 & 2 Wm. 4, c. 41, s. 19. The legislature either designedly or by oversight has not protected him. It seems to me that the decision of the Queen's Bench Division was right.

BOWEN, L.J. I am of the same opinion. We cannot concur in the argument which has been addressed to us, without doing violence to the word "this" occurring in 1 & 2 Wm. 4, c. 41, s. 19: the counsel for the defendant gives it a meaning different from its ordinary and natural signification. The omission to protect a constable who makes a mistake in discharge of his duty under the Contagious Diseases (Animals) Act, 1878, may have arisen from either accident or design; but however it may have occurred, we cannot supply it.

FRY, L.J. I am of the same opinion. 2 & 3 Vict. c. 93, s. 8, no doubt includes the provisions of 1 & 2 Wm. 4, c. 41, s. 19, for the protection of constables; but the counsel for the defendant wishes us to hold that those provisions extend to the protection of acts done in pursuance of a subsequent statute, namely, the Contagious Diseases (Animals) Act, 1878. I think, however, that 1 & 2 Wm. 4, c. 41, cannot be held to protect acts intended to be done pursuant to that statute, even although the duties imposed upon constables by it are of an analogous character to those referred to in 1 & 2 Wm. 4, c. 41.

Judgment for the plaintiff.

Solicitors for plaintiff: *Bell, Brodrick, & Gray, for L. C. & H. F. Lockhart, Hexham.*

Solicitor for defendant: *J. L. Morris.*

J. E. H.

LLOYD, APPELLANT; LLOYD, RESPONDENT.

1885
March 14.

Game—Prevention of Poaching—Search by Constable in Highway—Seizure— 25 & 26 *Vict. c.* 114, *s.* 2.

A police constable saw the appellant in a highway with some rabbits slung over his back. The appellant left the highway and ran across a meadow followed by the police constable, and on being overtaken, at a distance from the highway, he threw the rabbits on the ground, and they were then and there taken possession of by the police constable. On appeal against a conviction under 25 & 26 Vict. c. 114, s. 2:—

Held, that the conviction was right.

Turner v. *Morgan* (Law Rep. 10 C. P. 587) commented on.

CASE stated by justices on an information by the respondent, one of the police constables for the county of Hereford, against the appellant under 25 & 26 Vict. c. 114, s. 2, for that, on the 20th of September, 1884, at Burghill, in the said county, he was lawfully searched by the respondent in a highway there situated, the respondent then having good cause to suspect him of coming from land where he had been unlawfully in search of game, and of having in his possession game unlawfully obtained, and there being then and there found upon him upon such search certain game, to wit, twenty-one rabbits.

The statute 25 & 26 Vict. c. 114, entitled "An Act for the prevention of poaching," by s. 2 enacts, "It shall be lawful for any constable or peace officer, in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, or nets or engines used for killing or taking game, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person, and should there be found any game or any such article or thing as aforesaid upon any such person, cart, or other conveyance, to seize and detain such game, article, or thing; and such constable or police officer shall in such case apply to some justice of the peace for a summons citing such person to appear before two justices of the peace assembled in petty sessions, as provided by the 18 & 19 of her present Majesty, c. 126, s. 9, as far as regards England and Ireland, and before a sheriff or any two justices of the peace in Scotland; and if such person shall have obtained such game by unlawfully going on any land in search or pursuit of game, or shall have used any such article or thing as aforesaid, for unlawfully killing or taking game, or shall have been accessory thereto, such person shall, on being convicted thereof, forfeit and pay any sum not exceeding five pounds, and shall forfeit such game, guns, parts of guns, nets, and engines; and the justices shall direct the same to be sold or destroyed . . . ."

At the hearing of the information the following facts were proved:—

Between five and six o'clock in the morning the respondent was standing upon a footpath, which was a highway, and saw the appellant in company with two other men walking towards him along the highway. One of the other men had a bag upon his back, and the appellant had a number of rabbits slung across his shoulder. As soon as the appellant saw the respondent he left the highway and ran across two meadows. The respondent followed and overtook him, when the appellant threw the rabbits on the ground, and the respondent took possession of them. The spot at which the rabbits were so seized was distant 200 yards at least from any highway. From the time when the respondent first saw the appellant and the rabbits on the highway, until he seized the rabbits, he never lost sight of the appellant or the rabbits.

The solicitor for the appellant contended that he ought not to be convicted, because the rabbits were not actually seized by the constable in a highway. The justices, however, were of opinion that as the rabbits were seen in the possession of the appellant while he was in the highway, and were seized without ever having been lost sight of, the requirements of the statute as to seizure were complied with, and they convicted him.

The question for the opinion of the Court was, whether upon the above statement of facts, the justices came to a correct decision in point of law in holding that there was a good seizure of the rabbits.

C. H. Anderson, for the appellant. The conviction cannot be supported. It is clear that the search must take place in the highway, street, or public place: *Clarke* v. *Crowder* (1); and in that case Brett, J., expressed an opinion that the seizure and detainer of the game must also be in the highway. There is no break in the section, and the words "in any highway," govern all that follows; consequently in *Turner* v. *Morgan* (2) the Court expressly decided in accordance with the opinion expressed by Brett, J., in the former case.

W. R. Smith, for the respondent. The cases do not apply, for in neither case was it necessary to decide that the seizure must be in the highway, because in neither case had there been any search. Here there was what is equivalent to search, that is, the game was actually seen on the appellant in the highway. What followed was one continuous act. It might be that if the search was at one time and the seizure at another both would have to be in the highway, but it cannot have been intended that no pursuit should take place, and that the suspected person could stop the action of the constable by throwing the game off the highway.

C. H. Anderson, in reply.

MATHEW, J. I am of opinion that this conviction should be upheld. It is said that on the true construction of the statute the justices had no jurisdiction to convict unless each of two conditions were complied with, the first that the defendant should be searched in a highway, and the second that the game should be seized in the highway. When I turn to the Act I find no such words as would support this suggestion. All that is necessary under the Act is that the suspected person should be searched in the highway, and, that having been done, that the game found should be seized and detained by the constable. It is indicated that the search, seizure, and detainer should take place then and there, but to suppose that all must of necessity take place in the highway would lead to this result, that the person searched and found to have game on him might get rid of all liability by throwing the game over a fence before the constable was able to seize it. Mr. Anderson relied on two cases in support of his contention. In each case the facts were peculiar, and each case differed from the one now before us, because in neither did the seizure take place then and there at the time of search. In *Clarke* v. *Crowder* (1) there was no search at all, and nothing was found on the accused. In *Turner* v. *Morgan* (2) nothing was seen but a bulky parcel, and at a considerable interval afterwards the constable was able to trace that parcel into a place which was not a highway, street, or public place. In *Clarke* v. *Crowder* (1) Byles, J., states what are the requirements of the statute, which when complied with will empower the justices to convict; they are that the accused must be found in a highway, street, or public place; secondly, a constable or peace officer must have good ground to suspect that he is coming from land where he has been unlawfully in search or pursuit of game; thirdly, he must have in his possession some game unlawfully obtained, or a gun or part of a gun, or net or engine for taking or killing game; fourthly, the game or other article or thing must have been found on him. These conditions existed in the present case, and it appears to me we should be rendering the Act a nullity if we adopted the conclusion to which Mr. Anderson invites us. We are not concluded by authority, though some of the learned judges who decided the former cases were of opinion that the game or article must be seized in the highway. The results of so holding could hardly have been present to the minds of the learned judges who gave those opinions, which were not necessary for the decision of the cases before the Courts, and cannot be taken to bind us in this case.

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(1) Law Rep. 4 C. P. 638. (2) Law Rep. 10 C. P. 587.

SMITH, J. I am of the same opinion. But for the two cases cited to us, I should have thought the matter clear. This is a statute which is declared to be an Act for the prevention of poaching, and that object is carried out by giving power to a constable to stop, in a highway, street, or public place, persons who are coming back from poaching. The Act says that a person searched must be in a highway, street, or public place, and it goes on to enact that should there be found any game upon such person (that is, the person who is in the highway and has been there searched), the constable may seize and detain it. The seizure and detainer must then and there follow the search, so as to be one transaction. There are no words in the statute which say that the seizure must be at the very spot where the search takes place or that it shall be in the highway. I wish to say that I do not think the justices would have jurisdiction to convict if, after a search in the highway, the constable let the suspected person go away, and then afterwards went after him and seized and detained the game. In this case the constable saw the rabbits upon the prisoner, and it has been decided that that is sufficient to satisfy the requirements of the statute as to search and finding: *Clarke* v. *Crowder*. (1) But it is said if a man who has been searched gets off the highway, the constable is functus officio. Such a construction would render the section a nullity, for all that a man who has been searched would have to do would be to throw the game over a hedge or into a ditch by the side of the highway and he would be free. This does not seem to me to be a reasonable construction of the statute; nor is it what the statute says. Are we then concluded by authority? In *Clarke* v. *Crowder* (1) there was no search in a highway, and consequently no jurisdiction in the justices. In *Turner* v. *Morgan* (2) there was no search, but Brett, J., is reported to have repeated what he said in the former case. But it was not necessary in this last mentioned case to decide whether the seizure and detainer must be in a highway, for there was no finding of game on the appellant, and consequently no legal seizure and detainer at all. The game was found in the possession of some one else, and none of the matters required to give jurisdiction existed. I think that if Brett, J., had had the effect of such a decision—namely, that the statute would be rendered nugatory in the way I have pointed out—present to his mind, he would not have used the expressions

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(1) Law Rep. 4 C. P. 638.

(2) Law Rep. 10 C. P. 587.

(1) Law Rep. 4 C. P. 638.

(2) Law Rep. 10 C. P. 587.

he is reported to have used. For these reasons I think our judgment must be for the respondent.

Judgment for the respondent.

Solicitors for appellant: *S. & C. Robinson & Wilkins, for Garrold & Matthews, Hereford.*

Solicitors for respondent: *Hunt & Son, for Symonds & Son, Hereford.*

A. M.

March 24.

THE SANDGATE LOCAL BOARD, APPELLANTS; PLEDGE, RESPONDENT.

Justices—Case, Power of Justices to state—Summary Jurisdiction Act (42 & 43 *Vict.* c. 49), s. 33—*Order, Determination, or other Proceeding of a Court of Summary Jurisdiction—General District Rate, Order for Payment of—Public Health Act,* 1875 (38 & 39 *Vict.* c. 55), s. 256—*Functions of Justices in enforcing General District Rate.*

A special case may be stated by justices under the 33rd section of the Summary Jurisdiction Act, 1879, upon an application to enforce payment of a general district rate under the 256th section of the Public Health Act, 1875.

On an application under the last-mentioned section to enforce a general district rate good on the face of it, the justices may not refuse to make an order for payment of the rate on the ground that there is a concurrent rate made for the same purpose.

CASE stated by justices under the Summary Jurisdiction Act (42 & 43 Vict. c. 49), s. 33.

The facts stated by the case, so far as material to this report, were as follows:—

The appellants, the local board for the district of Sandgate, had made a complaint against the respondent for non-payment of a general district rate dated the 4th of March, 1884. At the hearing of the complaint it appeared that a general district rate had been made and sealed by the appellants, bearing date the 11th of February, 1884, for the purpose, as appeared from the estimate entered in the rate-book, of defraying the costs of an action in which the appellants had been unsuccessful. The rate so made was not duly published subsequently in accordance with the statutory directions in that behalf, and therefore the appellants thought it better not to collect it, but passed a resolution that fresh notice should be given of the making of the rate, and that the rate should be re-made. Notice was given accordingly, and a fresh heading, bearing date the 4th of March, having been interleaved in the rate-book between the estimate and the heading of the rate of the 11th of February, the board on the 4th of March passed a resolution that the rate of the 11th of February should be re-executed or made, and that the seal of the board should be affixed accordingly, and the seal was affixed accordingly thereto. It further appeared that upon demand being made the respondent, who was one of the persons rated, had failed to pay the rate.

It was objected on behalf of the respondent that it appeared from the rate-book and the evidence given that there were two concurrent rates made for the same purpose, viz., the rate of the 11th of February and that of the 4th of March, and that the appellants had no power to abandon the rate of the 11th of February, which was a valid rate notwithstanding the want of due publication. It was contended, in substance, for the appellants that there were not really two rates but one; that if the rate of the 11th of February was invalid, the rate of the 4th of March was good, and, if the rate of the 4th of March was bad, the rate of the 11th of February was good, and the appellants were still entitled to collect it, and that the summons might be amended and made applicable to the February rate. The magistrates were of opinion that the rate of the 4th of March was not a good rate on the face of it, because in the same rate-book there was evidence of there being concurrent rates for the same purpose; that the rate of the 11th of February was enforcible and could not be abandoned; and that they could not amend the summons as suggested. They therefore dismissed the complaint. The question for the Court was in substance whether the decision of the magistrates was correct.

G. Denman, for the respondent, took the preliminary objection that the justices had no power to state the special case. The functions of the magistrates upon a summons under the 256th section of the Public Health Act, 1875, are ministerial only. The word "may" in that section must be read imperatively: *In re*

Neath and Brecon Ry. Co. (1); and, upon the production of a rate valid upon the face of it, the justices have no power to go behind it and inquire into its validity with regard to extrinsic matters; they are bound to enforce it. When the justices act ministerially, not judicially, the proceeding by special case is not applicable; but the proper remedy, if they refuse to act, is by mandamus or rule under Jervis's Act. It has been held with regard to the poor-rate that on an application for a warrant of distress there was no power to state a case under 20 & 21 Vict. c. 43: *Ex parte May.* (2)

[MATHEW, J. The question here turns on the language of the 33rd section of the Summary Jurisdiction Act, 1879, which differs from that of 20 & 21 Vict. c. 43.]

Meadows White, Q.C. (*R. Cunningham Glen,* with him), for the appellants. The poor-rate cases are not applicable. The language of the enactment relating to the enforcement of poor-rate (43 Eliz. c. 2, s. 4), differs from that of the 256th section of the Public Health Act, 1875, with regard to the general district rate. The magistrates do not act as a Court in granting distress warrants for poor-rate, and therefore cannot state a case, but the application under the Public Health Act for an order for payment of the rate is to be to a court of summary jurisdiction. Again, 20 & 21 Vict. c. 43, s. 2, only applied when there was a determination on an information or complaint, properly so called, which was not the case when the application was for the issue of a distress warrant for poor-rates. Under the Summary Jurisdiction Act, s. 33, wherever a person is aggrieved by any order, determination, or other proceeding of a court of summary jurisdiction, a case may be stated. It is contended that the language was purposely made wider than that of 20 & 21 Vict. c. 43.

G. Denman, in reply. It has been held in *Reg.* v. *Price* (3), that the Summary Jurisdiction Act has made no difference in the law with regard to applications to enforce poor-rates. It is contended that it is equally inapplicable in the case of a general district rate. There is nothing in the language of the Summary Jurisdiction Act, s. 33, to shew that it was intended to apply where the functions of the justices are not judicial but ministerial only. The provisions of the 256th section of the Public Health Act, 1875, are substantially identical with those of the repealed Public Health Act, 1848, 11 & 12 Vict. c. 63, s. 103, and it was held under that section that the functions of the justices were ministerial : *Reg.* v. *Newman* (1); *Walker* v. *Great Western Ry. Co.* (2)

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(1) Law Rep. 9 Ch. 263.

(2) 31 L. J. (M.C.) 161.

(3) 5 Q. B. D. 300.

[MATHEW, J. We are of opinion that the preliminary objection cannot be sustained].

Meadows White, Q.C. (*R. Cunningham Glen*, with him), for the appellants, proceeded to argue the case. The rate was on the face of it perfectly good. The justices could not go behind it and inquire into the question whether there was a concurrent rate. The existence of a concurrent rate would not render the rate a nullity. At the utmost it is only matter of appeal to the quarter sessions on the ground that the second rate is excessive and unnecessary.

G. Denman, for the respondent. The objection may be said to have appeared on the rate itself, for the fact of the existence of the concurrent rate could not but be observed by the magistrates on looking at the rate of the 4th of March in the rate-book. [He cited *Reg.* v. *Fordham*. (3)]

MATHEW, J. It appears to me that the magistrates ought to have made an order to enforce payment of the rate on the short ground that there was laid before them a rate perfectly good on the face of it. There are numerous authorities to shew that, under such circumstances, the duty of the magistrates was ministerial only. The objection taken before the magistrates was that the rate, which on the face of it appears to be a valid rate, must be treated as invalid, because it appeared from the rate-book that there was in existence a previous rate for the same purpose upon the same property. I do not think that the magistrates could go into the question. It seems to me that on the application to the court of summary jurisdiction to enforce the rate, such rate being good on the face of it, the magistrates could not go behind it and ought to have made the order.

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(1) 29 L. J. (M.C.) 117.

(2) 2 E. & E. 325; 29 L. J. (M.C.) 107.

(3) 3 P. & D. 95; 11 Ad. & E. 73.

SMITH, J. I agree. I wish to make a few observations on the question whether there was power to state a case. I do not consider that, in holding that there was, we are in any way overruling any of the previous cases. The cases with regard to the poor-rate decided under 20 & 21 Vict. c. 43, s. 2, are not, as it seems to me, applicable. That enactment refers only to determinations by justices of an information or complaint, and the cases have accordingly decided that under that statute the power to state a case was limited to cases where there had been an adjudication upon an information or complaint. The present case turns, as it seems to me, on different considerations. This is not a question of a poor-rate but of a rate under the Public Health Act, 1875. The 256th section of that Act provides that, when a person rated fails to pay the rate, any justice may summon the defaulter to appear before a court of summary jurisdiction to shew cause why the rate in arrear shall not be paid, and the court may make an order for payment of the same. The application to enforce the rate having thus to be made before a court of summary jurisdiction the question is whether there is power to state a special case under the Summary Jurisdiction Act, 1879. The 33rd section of that Act enacts that "any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a court of summary jurisdiction, on the ground that it is erroneous in point of law or in excess of jurisdiction, may apply to the Court to state a special case, &c." The question therefore is whether there is here "any person aggrieved who desires to question an order, determination, or other proceeding of a court of summary jurisdiction on the ground that it is erroneous in point of law." I think that the appellants here come within that description. For these reasons it seems to me that the previous cases that have been relied upon do not apply, and that there was power to state a special case.

Case remitted.

Solicitors for appellants: *Talbot & Tasker, for A. D. & L. J. Brockman.*

Solicitor for respondent: *J. Minter.*

E. L.

[IN THE COURT OF APPEAL.]

1884
Oct. 27.

BURGESS *v.* CLARK AND ANOTHER.

Local Government Acts—Officer of Local Board—"Concerned or interested in any bargain or contract" with Board—Demise of Rooms to Local Board—"Allowance" in addition to Salary—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 174, 175, 189, 193, 265.

A demise of rooms is a "bargain or contract" within the meaning of s. 193 of the Public Health Act, 1875, and if an officer, employed by a local board constituted under that statute, lets rooms to the board at a rent payable by it to him, although the rooms are used by it in the transaction of its business, he becomes liable to the penalty imposed by that section; for the rent payable by the local board cannot be considered as an "allowance" to the officer in addition to his salary within the meaning of ss. 189, 193, it being unconnected with the performance of any services in the course of his employment under the board.

ACTION to recover penalties under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 193.

The action came on for trial at the Winter Assizes, 1883, held for Wiltshire, before Cave, J., when the following facts were proved:—

In the year, 1873 the defendants, who were solicitors at Trowbridge, entered into an arrangement with the local board for Trowbridge, whereby the members of the board should have the use of a room belonging to the defendants, and the use of an iron safe, at the rent of 12*l.* a year, including cleaning, warming, and lighting. The room continued in the occupation of the local board down to 1877, when the defendants were appointed clerks to the local board at the rate of 90*l.* a year, "all out of pocket expenses and conveyances to be paid in addition to the salary." In 1880 the local board were in want of a room for the use of their surveyor, and they agreed to hire another room of the defendants, also at the rate of 12*l.* The terms of the resolution of the local board hiring the rooms were as follows:—"That the clerks be allowed in addition to their salary the sum of 12*l.* for the use and occupation of their large room for board and committee meetings, and the sum of 12*l.* for the front room for the use of the surveyor of the board. Six months' notice from any quarter by either party to determine this arrangement." The rent of 24*l.* a year continued to be paid to the defendants by the local board for the use of the two rooms, and the last payment before action was made about six months before action, namely, on the 2nd of January, 1883, the writ of summons being issued on the 12th of July, 1883.

The jury having been discharged by consent, Cave, J., was of opinion that the defendants had incurred the penalty imposed by the Public Health Act, 1875, s. 193, and judgment was entered for the plaintiff for one penalty of 50*l.*

The defendants appealed.

Ambrose, Q.C., and *A. J. H. Collins, Q.C.*, for the defendants. The defendants are not liable to the penalty imposed by the Public Health Act, 1875, s. 193. (1) A contract for letting rooms

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(1) By the Public Health Act, 1875, (38 & 39 Vict. c. 55), s. 4 (interpretation clause), "Lands include messuages, buildings, lands, easements, and hereditaments of any tenure."

Sect. 174 contains certain regulations as to the making of contracts by local boards, "whereof the value or amount exceeds 50*l.*," and also further regulations as to the making of contracts "of the value or amount of 100*l.* or upwards."

By s. 175 "any local authority may for the purposes and subject to the provisions of this Act purchase, or take on lease, sell, or exchange any lands, whether situate within or without their district."

By s. 189 "every urban authority shall from to time appoint fit and proper persons to be medical officer of health, surveyor, inspector of nuisances, clerk, and treasurer . . . . The urban authority may pay to the officers and servants so appointed or employed such reasonable salaries, wages, or allowances, as the urban authority may think proper."

By s. 193, "officers or servants appointed or employed under this Act by the local authority shall not in anywise be concerned or interested in any bargain or contract with such authority for any of the purposes of this Act.

"If any such officer is so concerned or interested, or, under colour of his office or employment, exacts or accepts any fee or reward whatsoever other than his proper salary, wages, and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of 50*l.*, which may be recovered by any person, with full costs of suit, by action of debt."

By s. 265, "no matter or thing done, and no contract entered into by any local authority or joint board, or port sanitary authority, and no matter or thing done by any member of such authority, or by any officer of such authority, or other person whomsoever acting under the direction of such authority, shall, if the matter or thing were done, or the contract were entered into bonâ fide for the purpose of executing this Act, subject them or any of them personally to any action, liability, claim, or demand whatsoever;

is not a "bargain or contract" within the meaning of that section, which is aimed at contracts for buying or selling lands or chattels, or at all events, at contracts such as are mentioned in s. 174. Further, by s. 175 the local board have unlimited power to take on lease "any lands, whether situate within or without their district." The word "lands" will include rooms, and as the local board could lawfully hire any rooms for the purposes of the Act, surely it was lawful for the defendants to let their rooms to the board. Moreover the defendants are protected by s. 265; the contract for the hire of the rooms was a contract entered into by the local authority; the defendants were clerks to the local board, and in letting the rooms they were acting under its direction; there was no evidence of a corrupt motive, and it is plain that the defendants were acting bonâ fide. At all events, the payment of rent was an "allowance" made by the local board to the defendants in addition to their salary; it was, therefore, recognised and rendered lawful by ss. 189, 193.

Arthur Charles, *Q.C.*, and *Charles Mathews*, for the plaintiff, were not called upon to argue.

BRETT, M.R. The first point to be determined is whether there was any kind of bargain or contract between the local board and the defendants. There was a demise of rooms by the defendants to the local board, there was, therefore, a bargain or contract for the exclusive use and occupation of them: and consequently there was a bargain or contract of some kind between the local board and the defendants. It has been urged, however, that the demise of rooms is not a "bargain or contract" within the meaning of the Public Health Act, 1875, s. 193, and it has been contended that the only bargains or contracts within the enactment are bargains or contracts for purchase or sale of lands or chattels; but it has a larger operation. Sect. 193 was enacted, not for the punishment of offences, but for the prevention of temptation, and it was intended to prevent bargains and contracts of every kind between a local board and its officers.

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and any expense incurred by any such authority, member, officer, or other person acting as aforesaid, shall be borne and repaid out of the fund or rate applicable by such authority to the general purposes of this Act."

It has been further argued that the payment of the rent of the rooms was an "allowance" within the Public Health Act, 1875, ss. 189, 193. I think that it would be a disastrous interpretation of the enactments to hold that the payment of rent is an "allowance" within their meaning. The word "allowance" means a payment beyond the agreed salary of the officer for additional services rendered by him to the local board; it does not apply to a contract for letting rooms.

As to the argument founded upon s. 265, I have to observe that the local board could not direct or compel the defendants to let the rooms to it, and it is plain that the defendants were acting on their own behalf in demising the rooms to the board.

This is a hard case, but it seems to me that the defendants are liable to the penalty imposed by the statute.

COTTON, L.J. In the Public Health Act, 1875, s. 174, are contained provisions as to the making of certain kinds of contracts, and it has been urged that only those contracts are within s. 193 which are within s. 174. It seems to me that s. 174 has no reference to s. 193, and that the letting of rooms is a "bargain or contract" within the latter enactment. It has been contended that the payment of rent was an "allowance," which the local board had power to make to its officers; but I am of opinion that it is not an "allowance" within the meaning of ss. 189, 193; these enactments merely mean that the officers of the local board may be allowed the use of a room, or coals, or candles, or articles of the like kind, or at all events, may receive an allowance from the local board for the payment of them, provided they are used in the discharge of their duties to the local board; and possibly "allowance" may simply mean the allowance of something out of the property of the local board. In the present case, the defendants, being officers of a local board, receive payment from it of 24*l.* a year, and that payment is unconnected with services rendered to the local board. It is said that the statute is aimed only at acts done corruptly; in the present case I am satisfied that there was no corruption, but s. 265 does not protect the defendants: it protects the officers of the board only when they do any matter or thing on behalf of the board; in cases of that kind they are to be indemnified by the board, and are to be relieved from all personal liability. In the present case the defendants were not acting on behalf of or under the direction of the local board, but they were contracting on their own behalf with the local board for their own pecuniary benefit. Sect. 265 does not apply here. I think that the judgment of Cave, J., was right.

LINDLEY, L.J. I am of the same opinion. I wish that I could avoid a decision adverse to the defendants, but upon the construction of the Public Health Act, 1875, I am of opinion that the defendants are liable to the penalty.

Judgment for the plaintiff. (1)

Solicitors for plaintiff: *Angell, Imbert-Terry & Page.*
Solicitors for defendants: *Whitakers & Woolbert.*

J. E. H.

[IN THE COURT OF APPEAL.]

Nov. 8.

TODD *v.* ROBINSON.

Local Government Acts—Officer—Shareholder in Company—Contract between Company and Local Board—"Interested in any bargain or contract" with Local Board—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 193.

An officer of a local board, who is a shareholder in a company having a contract with the board, is, so long as the contract exists, "interested in a bargain or contract" with the board within the meaning of the Public Health Act, 1875, s. 193, and if the contract is capable of producing any profit to the shareholders of the company, he is liable to the penalty imposed by that enactment.

ACTION to recover a penalty under the Public Health Act, 1875, s. 193. The writ of summons was issued on the 28th of July, 1883.

The action came on for trial at the winter assizes, 1883, held for Northumberland, before Field, J., when the following facts were proved:—

The defendant became clerk to the Local Board of Cowpen on the 30th of September, 1874, and continued to be so until the

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(1) See next case.

29th of September, 1883. He had been a shareholder in the Blyth and Cowpen Gas Company for some years, and still continued to be a shareholder. An agreement had been in force since 1872 between the gas company and the local board that the district should be supplied with gas for the price of forty-five shillings per lamp for the season of nine months, commencing the 15th of August and ending the 15th of May. In September, 1881, the local board applied to the gas company to erect about twenty additional lamps in the outlying parts of the district of the board; and as the gas company did not expect a remunerative private consumption, they asked the local board to consent to an advance of one shilling per lamp throughout the whole district, in order to mitigate, as they alleged, their loss upon public lamps, and it was agreed that this should be done. And on the 26th of July, 1882, it was resolved by the local board "that the gas company's terms of forty-six shillings per lamp throughout the district be accepted, and that the company be instructed to proceed with the usual lighting as heretofore, and with Crofton and Cowpen Square as speedily as possible; the price to be forty-five shillings per lamp till the extensions have been made, and then forty-six shillings per lamp for the season. Lamps to be fixed to the satisfaction of lighting committee, both for number and position." A letter was written by the defendant as clerk to the local board informing the gas company of the resolution of the board, but no formal agreement under the seal of the board was executed. The gas was supplied by the company upon the terms of the resolution of the board, and the amount payable to the company at forty-six shillings per lamp was equal to 311*l.* 13*s.* for the full season. The benefit, accruing to the defendant as shareholder from the contract for the supply of gas, was merely nominal.

Field, J., gave judgment for the plaintiff for a penalty of 50*l.*, and the defendant appealed.

Nov. 7. *T. Willes Chitty*, for the defendant. The defendant was not "concerned or interested" in any contract made with the local board within the meaning of s. 193 of the Public Health

Act, 1875 (1), even if the acceptance by the board of the terms offered by the gas company is a contract sufficient for that purpose. The defendant had nothing to do with making the contract, and was certainly not "concerned" in it. Neither was he "interested" in it. To be interested in it within the meaning of the Act, he ought to have had the power of refusing to be interested in it. The interest which he had was only as a shareholder of the gas company, and that is not an interest in the contract in the sense intended by s. 193 of the statute; otherwise every officer of the local board who was a ratepayer might be said to be interested, and as such liable to the penalty imposed by that enactment. Next, the contract must be one which was binding on the parties to it, which this was not, as it was not under seal as required by s. 174, though it was for an amount exceeding 50*l.* Lastly, this action, which is a penal one, was not brought in time. The action was not brought as required by

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(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 161, "any urban authority may contract with any person for the supply of gas, or other means of lighting the streets, markets, and public buildings in their district, and may provide such lamps, lamp-posts, and other materials and apparatus as they may think necessary for lighting the same."

By s. 174 (1), "Every contract made by an urban authority, whereof the value or amount exceeds 50*l.*, shall be in writing and sealed with the common seal of such authority."

By s. 193, "Officers or servants appointed or employed under this Act by the local authority, shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act. If any such officer is so concerned or interested, or, under colour of his office or employment, exacts or accepts any fee or reward whatsoever other than his proper salary, wages, and allowances, he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of fifty pounds, which may be recovered by any person, with full costs of suit, by action of debt."

By Schedule II., r. 64, "Any member who . . . in any manner is concerned in any bargain or contract entered into by" the local board of which he is a member, "or participates in the profit thereof . . . . shall, except in the cases next hereinafter provided, cease to be such member, and his office as such shall thereupon become vacant: Provided that no member shall vacate his office . . . by reason of his being interested in any contract with the local board as a shareholder in any joint stock company, but he shall not vote at any meeting of the local board on any question in which such company are interested, save that in case of a water company or other company established for the carrying on of works of a like public nature, this prohibition may be dispensed with by the Local Government Board."

31 Eliz. c. 5, s. 5, within a year after the offence committed: *Dyer* v. *Best* (1); for the only contract here was by the resolution of the board to accept the offer of the gas company, and that resolution was passed on the 26th of July, 1882, and this action was not commenced until the 28th of July, 1883.

Nov. 8. *Bosanquet, Q.C.*, and *Lawson Walton*, for the plaintiff. First, by the Public Health Act, 1875, Sch. II., r. 64, it is enacted that a member of a local board shall be disqualified, if he "in any manner is concerned in any bargain or contract entered into by such board or participates in the profit thereof;" but the disqualification does not extend to a case, where a member of the board is a shareholder of a company having a contract with the local board. The present action is brought upon s. 193, which contains a prohibition of a similar nature as to officers and servants of a local board; but there is no clause exempting them from liability, if they are shareholders in companies having contracts with the local boards under which they are employed; and the difference of language between the two clauses is very strong evidence, that the legislature intended that a difference should exist between members and officers. It is possible that cases of hardship may arise under s. 193; but it is evident that by that enactment the legislature intended to include cases of hardship and to make the prohibition as to officers and servants absolute; for the legislature has mitigated the former rigour of the law by the Public Health (Officers) Act, 1884 (47 & 48 Vict. c. 74), which renders the consent of the Attorney General necessary to the maintenance of any action for penalties under s. 193; that statute, however, was passed after the commencement of the present action. As to any argument founded upon a supposed hardship arising from the circumstance that the defendant is a shareholder, it is to be recollected that the difference between a shareholder and a partner is merely technical, and that cases of hardship may equally happen as regards partners; and an officer of a board who is a sleeping partner with a very small stake in the business of the partnership, will become liable to the penalty under s. 193, if the firm of which he is a member enters into a contract with the local board under which he is employed. A similar prohibition as to contracts by a councillor or alderman with the council of a borough was contained in the Municipal Corporations Act, 1835 (5 & 6 Wm. 4, c. 76), s. 28 (1), and the legislature assumed that this prohibition extended to shareholders in companies, and thereupon, by 32 & 33 Vict. c. 55, s. 5, relieved them from any liability, if the companies of which they were shareholders entered into contracts with the councils of the boroughs of which they might happen to be members.

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(1) Law Rep. 1 Ex. 152.

[LINDLEY, L.J. It was held in *Dimes* v. *Proprietors of Grand Junction Canal* (2) that a judge is disqualified on the ground of interest to decide a cause, to which a company is party in which he is a shareholder.]

So stringent is the rule that no judge shall decide any matter in which he has an interest, that before 40 Vict. c. 11, a judge was disqualified from deciding any proceeding if he was interested therein, even as a mere ratepayer. Surely it was to go much further to hold that a judge of the Superior Courts was disqualified by reason of interest, than to hold that the officer of a local board is disqualified on the same ground.

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(1) By the Municipal Corporations Act, 1835 (5 & 6 Wm. 4, c. 76), s. 28, no person shall "be qualified to be elected or to be a councillor or an alderman of any . . . borough, . . . during such time as he shall have directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of" the "council; provided that no person shall be disqualified from being a councillor or alderman of any borough as aforesaid by reason of his being a proprietor or shareholder of any company, which shall contract with the council of such borough for lighting or supplying with water or insuring against fire any part of such borough."

By 32 & 33 Vict. c. 55, s. 5, "from and after the passing of this Act no person shall be deemed to have had or to have an interest in a contract or employment with, by, or on behalf of the council of any borough, by reason only of his having had or having a share or interest in any railway company, or in any company incorporated by Act of Parliament, or by Royal Charter, or under the Companies Act, 1862; and no councillor, alderman, or mayor in any municipal corporation shall be deemed to have been or to be disqualified to be elected or to be such councillor, alderman, or mayor, by reason only of his having had or having any share or interest in any railway company, or in any company incorporated by Act of Parliament, or Royal Charter, or under the Companies Act, 1862; but all elections of councillors, aldermen, or mayors as aforesaid shall be deemed and taken to have been and to be valid, notwithstanding any such share or interest as aforesaid."

(2) 3 H. L. C. 759.

Secondly, s. 174 of the Public Health Act, 1875, does not apply to a case of the present nature; s. 193 refers to every "bargain or contract," which has been entered into by a local board; the agreement for the supply of gas was at least a "bargain" if not a "contract," within the meaning of s. 193, and therefore the defendant has incurred the penalty.

Thirdly, the offence committed is a continuing offence; the liability of the defendant continued so long as the gas was supplied; this is plain from *Lewis* v. *Carr* (1), and therefore the plaintiff is not prevented by 31 Eliz. c. 5, s. 5, from suing to recover the penalty. The present action is brought in due time. It is unnecessary for the plaintiff to argue that *Dyer* v. *Best* (2) was wrongly decided; but it is to be observed that in *Robinson* v. *Currey* (3) doubts were expressed by Bramwell, L.J., as to the soundness of the decision in *Dyer* v. *Best.* (2) The judgment in *Robinson* v. *Currey* (3) certainly does restore the authority of *Calliford* v. *Blawford* (4), and in one respect at least the judgment in *Dyer* v. *Best* (2), which threw doubts upon that case, is wrong.

T. Willes Chitty, in reply. The words of the Municipal Corporations Act, 1835, are different from those of the Public Health Act, 1875, s. 193; the words "directly or indirectly," occur in the former statute, but are absent in the latter; they make an important distinction.

Further, the defendant was not interested in the bargain or contract with the gas company, for he became disqualified from acting as clerk as soon as the contract was entered into.

BRETT, M.R. I am sorry that I am obliged to affirm the judgment of Field, J. The first question is whether the defendant is "interested" in a contract made with the local board for any of the purposes of the Public Health Act, 1875. The contract was for lighting streets, and therefore was within s. 161. Was it a "bargain or contract" within s. 193? If there had been no authority, I should have had doubt, and I should have hesitated to hold that a merely nominal interest as shareholder is within the statute, and I might have thought that the statute was intended to apply only to a real and substantial interest in a contract; but I am not without a guide to the true construction of the Public Health Act, 1875. Upon turning to the Municipal Corporations Act, 1835 (5 & 6 Wm. 4, c. 76), s. 28, I find that no person shall be qualified to be a councillor or an alderman "during such time as he shall have directly or indirectly, by himself or his partner, any share or interest in any contract or employment with, by, or on behalf of" the council of a borough: this provision was amended by 32 & 33 Vict. c. 55, s. 5, which enacts that no person shall be deemed to have had or to have an interest in a contract with the council of a borough by reason only of his being a shareholder. The latter enactment was not declaratory of the law, but was remedial; it shews that the legislature assumed that a councillor who was a shareholder in a company having a contract with the council, was within the prohibition of the Municipal Corporations Act, 1835; it shews that the legislature considered that the language of s. 28 of the original statute must be construed in a sense, which by analogy is opposed to the argument for the defendant. The Municipal Corporations Act, 1835, s. 28, is similar in its terms to the Public Health Act, 1875, s. 193; and, therefore, the officer of a local board, who is a shareholder in a company contracting with it, must be held to fall within the prohibition of the latter enactment. The argument arising upon the Municipal Corporations Act, 1835, s. 28, and the amending statute is the strongest authority against the defendant. It is unnecessary to say whether *Dimes* v. *Proprietors of Grand Junction Canal* (1) is an equally strong authority against him. That was a case relating to the judicial office; but there the words of Parke, B., in delivering the opinion of the judges, and also the language of the law lords are in favour of the argument for the plaintiff.

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(1) 1 Ex. D. 484.

(2) Law Rep. 1 Ex. 152.

(3) 7 Q. B. D. 465, at pp. 471, 472.

(4) 1 Shower, 353; sub. nom. *Culliford* v. *Blandford*, Carth. 232; 4 Mod. 129.

Secondly, was the defendant "interested" in the contract within one year before action brought? I do not so say that he was "concerned" in the contract within one year; it is not material: but was he "interested?" He was interested during the whole time that he was clerk to the board, that is, until after the time of commencing the action. It appears that a new arrangement was made upon the 26th of July, 1882, and it has been argued that the cause of action accrued then, and that as the writ of summons was not issued until the 28th of July, 1883, the plaintiff cannot succeed. We must not overthrow him on the ground that the action was not brought in due time; for the defendant having continued to be clerk until after the commencement of suit, the action was rightly brought, and it seems to me that this appeal must be dismissed.

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(1) 3 H. L. C. 759.

COTTON, L.J. I am of the same opinion. The defendant was not acting corruptly; but parliament has laid down a rule, that no man shall act as an officer of a local board if he takes part in any contract entered into by it, so that no official shall be under the temptation to act corruptly. I think that the defendant was "interested" in the contract for lighting the streets. Schedule II., r. 64, helps the construction in favour of the plaintiff. By that provision a member of a local board incurs the penalty, if he "in any manner is concerned in any bargain or contract entered into by such board or participates in the profit thereof." It seems to me that "participates in the profit" may be taken as explanatory of the phrase "interested" in s. 193. The defendant was a member and shareholder of the gas company; the profits of the gas company go to the benefit of the shareholders, and this circumstance is conclusive to shew that the defendant is within the Act. Then the Municipal Corporations Act, 1835, and the amending Act (32 & 33 Vict. c. 55), shew what the true construction of the Public Health Act, 1875, s. 193, must be. The words "directly or indirectly" do not make any difference. It is not necessary to say whether the defendant was "concerned" in the contract; he was interested in it down to the time when he resigned his office, and the fact that a year had elapsed since the new arrangement was made did not matter. As to the last point urged by the defendant's counsel in his reply, I need only say that according to his argument the defendant never was clerk, for his disqualification existed when he was appointed; but the statute is aimed at any person, who is acting de facto as an officer of the board, although he is not appointed de jure. The defendant is liable at least to one penalty.

LINDLEY, L.J. I agree with the other members of the Court. I think that Schedule II., r. 164, throws light upon s. 193, and I do not see any escape from a conclusion adverse to the defendant if the words "is interested" are read as co-extensive and identical with "participates in profits." I am glad that the law has been so far modified as to require the consent of the Attorney General, before an action for penalties can be commenced.

Judgment for the plaintiff. (1)

Solicitors for plaintiff: *Brownlow & Howe, for Edward Clark, Newcastle-upon-Tyne.*

Solicitors for defendant: *J. E. & H. Scott, for W. S. Daglish, Newcastle-upon-Tyne.*

J. E. H.

Dec. 10.

IN RE AN ARBITRATION BETWEEN ALICE WADHAM AND OTHERS AND THE NORTH EASTERN RAILWAY COMPANY.

Lands Clauses Act, 1845 (8 & 9 *Vict.* c. 18)—*House "injuriously affected"—Special value as a Public-house—Compensation for.*

Under statutory powers conferred by an Act incorporating the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), a railway company stopped up a street in which were a house and premises used as an hotel, whereby the value thereof for using, selling, or letting as an hotel and public-house was diminished:—

Held, that the owner was entitled to compensation under the Lands Clauses Act, 1845, for the depreciation in the special value of the premises as an hotel and public-house.

SPECIAL CASE stated by an arbitrator under the Lands Clauses Act, 1845, setting out his award which, inter alia, recited that by virtue of the North Eastern Railway Company's Act, 1876, and of certain other Acts of Parliament incorporated therewith, the North Eastern Railway Company were authorized to alter and stop up the roads in the said Acts mentioned, and that the railway company had in the exercise of the powers by the said Acts conferred upon them altered and stopped up a certain road and highway known as Hudson Street, and that notice had been given by the owners in fee that houses, land, and premises in Hudson Street, and known as the Royal Hotel, together with a dwelling-house and shop adjoining thereto, and the lands and hereditaments held and enjoyed therewith had been thereby injuriously affected, and that compensation was claimed, and the claimants and company had arranged that the question of such compensation should be referred to an arbitrator under the Lands Clauses Act, 1845; the award then alleged that the arbitrator had undertaken the reference and heard the parties, and found that the Royal Hotel, and dwelling-house, and premises had been injuriously affected by reason of the execution of the works by the company, and he assessed the compensation at the sum of 650*l.*

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(1) See last case.

And by way of Special Case for the opinion of the Court the arbitrator stated as follows: I. "I hereby state and find as facts that the said house and premises known as the Royal Hotel have, by reason of the execution by the said company of the said works authorized by the said Acts, been rendered less suitable for the purposes of being used as an hotel and public-house, and by reason thereof the value of the said Royal Hotel for using, selling, or letting as an hotel and public-house has been diminished. I have not in my award and determination hereinbefore contained allowed for or included any sum as compensation for the depreciation in the special value of the said Royal Hotel as an hotel and public-house. And I hereby submit for the opinion of the Court whether or not I ought to have allowed for and included in my award any sum in respect of the depreciation in the special value in this paragraph mentioned.

"If the Court should be of opinion that I ought to have allowed for and included in my said award and determination a sum as compensation for the said depreciation in the said special value of the said Royal Hotel as an hotel and public-house, then I hereby assess, award, and determine such sum to be the further sum of 900*l.*, and in such event I assess, award, and determine the amount of compensation to be paid by the said North Eastern Railway Company in respect of the injurious affecting of the said houses, lands, and premises situate in Hudson Street aforesaid, and known as the Royal Hotel, and the said dwelling-house and shop adjoining thereto, and the lands and hereditaments held and enjoyed therewith by reason of the execution of the said works by the said company at the sum of 1550*l.* in lieu of and substitution for the said sum of 650*l.*, and not in addition thereto."

The Court was requested to decide whether the arbitrator should have made any allowance as compensation for the depreciation in the special value mentioned in paragraph 1.

A. Charles, Q.C. (*A. Cock*, with him), for the claimants. The claimants are entitled to receive compensation for the premises as a licensed public-house, and not merely as an erection of bricks.

The Court called on

Sir Farrer Herschell, S.G. (*Meysey-Thompson*, with him), for the railway company. The arbitrator rightly followed the decisions of the House of Lords on the subject of compensation when land is injuriously affected: *Ricket* v. *Directors, &c., of Metropolitan Ry. Co.* (1) He ought not to estimate the value of the premises having regard to the use of them at the time when affected, for such use may be precarious, but he ought to inquire how much the property as a house is damnified; 650*l.* has been given for injuriously affecting the house and land, but then the claimants demand more in respect of the house being licensed. The licence only gives a temporary value to the house. A house which has a licence to-day may lose it to-morrow. As Willes, J., said in *Beckett* v. *Midland Ry. Co.* (2), after commenting on the judgment of the House of Lords in *Ricket's Case* (1), "The damage complained of must be one which is sustained in respect of the ownership of the property,—in respect of the property itself, and not in respect of any particular use to which it may from time to time be put: in other words, it must, as I read that judgment, be a damage which would be sustained by any person who was the owner, to whatever use he might think proper to put the property." The right to compensation depends on the language of the Lands Clauses Act "injuriously affected." The damage must be to the property and not to the use of the property. The arbitrator should regard the building and estimate how much it

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(1) Law Rep. 2 H. L. 175.

(2) Law Rep. 3 C. P. 82, at p. 94-5.

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is diminished in value because persons cannot come to it; compensation has been given for the difficulty of access, but compensation should not be given because persons will not come for a particular purpose. In *Ricket's Case* (1) the House of Lords in defining the right to compensation limited the words "injuriously affected" so as not to include such a claim as that in the present case. Lord Westbury dissenting, took the view for which the plaintiff now contends, and Lord Chelmsford no doubt made a distinction between temporary and permanent obstruction. But in *Caledonian Ry. Co.* v. *Walker's Trustees* (2) Lord Selborne, L.C., says: "Much of Lord Chelmsford's reasoning was founded upon a distinction between temporary and permanent damage under the 68th section of the Lands Clauses Act, and the 6th and 16th sections of the Railways Clauses Act, in which Lord Cranworth did not concur; and it certainly does not appear to me that the decision of *Ricket's Case* (1) either in this House or in the Exchequer Chamber, can satisfactorily be explained by any such distinction. But both these noble and learned Lords agreed that the damage by loss of custom, of which the plaintiff complained, was a consequence of the works of the railway company, too remote and indefinite to bring it within the scope of any of the compensation clauses of the Acts" . . . . The deterioration of the value of the property must be irrespective of any particular use which may be made of it: *Caledonian Ry. Co.* v. *Walker's Trustees.* (3) The subject of compensation "must be damage or injury to the 'land' of the claimant considered independently of any particular trade that the claimant may have carried on upon it," said Lord Penzance in *Metropolitan Board of Works* v. *McCarthy* (4), and Lord Cairns, L.C., adopted the same view.

A. Charles, Q.C. If the "land injuriously affected" is merely land, compensation must be given for it as land; but compensation must be given for it if houses as houses, shops as shops, a mill as a mill, a public-house as a public-house. In *Chamberlain* v. *West End of London and Crystal Palace Ry. Co.* (5) the arbitrator found that by reason of the obstruction of access, the premises were rendered less suitable for the purpose of being used and occupied as shops, and gave compensation accordingly.

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(1) Law Rep. 2 H. L. 175.

(2) 7 App. Cas. 259, at p. 283.

(3) 7 App. Cas. 259.

(4) Law Rep. 7 H. L. 243, at p. 262.

(5) 2 B. & S. 605.

The observation of Willes, J., in *Beckett* v. *Midland Ry. Co.* (1), applied to a house in its then condition, and he said: "The property is to be taken in statu quo, and to be considered with reference to the use to which any owner might put it in its then condition, that is, as a house."

In *Caledonian Ry. Co.* v. *Walker's Trustees* (2), Lord Selborne, L.C., points out that in *Ricket's Case* (3) "No claim for compensation was made on the ground of any actual or supposed interest of the plaintiff Ricket in any of the carriage roadways which were obstructed, or on any other grounds, except the loss of custom to his trade as a publican. He did, indeed, allege in his claim, 'that his public-house had been injuriously affected,' but loss of custom was the only ground stated for that allegation." And in *Metropolitan Board of Works* v. *McCarthy* (4), Lord Chelmsford said: "In *Ricket's Case* (3) there was no finding which related to the premises, but merely of personal damage; here the special case expressly states an injury and damage to the premises" as in the present case.

Sir F. Herschell, S.G., replied. No doubt the nature of the building may be taken into consideration, and the fact of it being business premises, but not the fact of any particular business being carried on there.

MATHEW, J. I think the claimants are entitled to the larger sum which is mentioned by the arbitrator as the measure of the loss under the circumstances stated in the case. The finding of the arbitrator in the first place, is that the "house and premises known as the Royal Hotel have, by reason of the execution by the said company of the said works authorized by the said Acts, been rendered less suitable for the purposes of being used as an hotel and public-house, and by reason thereof the value of the said Royal Hotel for using, selling, or letting as an hotel and public-house has been diminished." I construe that to mean that the property for the purpose of being sold in the market is less valuable by reason of what the company has done. The arbitrator then says: "I have not in my award and determination . . . . allowed for or included any sum as compensation for the depreciation in the special value of the said Royal Hotel as an hotel and public-house. And I hereby submit for the opinion of the Court whether or not I ought to have allowed for and included in my award any sum in respect of the depreciation in the special value in this paragraph mentioned"; he goes on to say that if the Court be of opinion that he ought to have allowed for and included in his award and determination a sum as compensation for the said depreciation in the said special value of the Royal Hotel as an hotel and public-house, then he assesses and awards and determines such sum to be the further sum of 900*l.*, and the amount of compensation to be 650*l.*, increased by that 900*l.* The learned arbitrator does not find that that 900*l.* represents any depreciation in the trade carried on by the particular tenant; nor does he find that the depreciation of value is due to any interference with the access of particular customers to the particular house, but he does find that the value of the property apart from the purpose for which it is being used is 650*l.* instead of the sum which he represents at 1550*l.*, including 900*l.* in respect of the injury done. The learned Solicitor General has called to our attention different cases in which the mode of assessing compensation for the injurious affection of premises used as these premises are said to have been used is laid down, and looking at the language of the learned judges, no doubt there is a foundation for the argument on behalf of the railway company. But I do not understand the learned judges to have intended to lay down more than this, viz. that you are not, in calculating the damage for injuriously affecting the premises, to take into account any special and exceptional value which the premises may have in the possession of the then proprietor, but you are to see whether or not the value of the property as a marketable article to be employed for any purpose to which it may legitimately and reasonably be put has been interfered with or not. Upon that ground it appears to me that in this case we are bound to award the larger sum that has been found by the arbitrator, because I construe his award to be that, if the property were put up to-morrow in statu quo to be sold to be used for any purpose to which it could be put, including the purpose of a public-house, it would be worth 900*l.* less than it was before the railway company caused the obstruction of which the claimants complain.

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(1) Law Rep. 3 C. P. 82, at p. 95.

(2) 7 App. Cas. 259, at pp. 281, 282.

(3) Law Rep. 2 H. L. 175.

(4) Law Rep. 7 H. L. 243, at p. 259.

Our judgment must be for the claimants.

DAY, J., concurred.

Judgment for the claimants.

Solicitors for claimants: *Iliffe, Russell, Iliffe, & Cardale.*

Solicitors for railway company: *Williamson, Hill, & Co.*

J. R.

THE QUEEN *v.* ESSEX.

Dec. 12.

Lands Clauses Act, 1845 (8 & 9 *Vict.* c. 18), *s.* 63—*Part of Building Estate taken for Sewage Farm—Value of other Parts thereby depreciated—Compensation for "injuriously affecting" same.*

Part of land laid out as a building estate was taken by a local board under an Act incorporating the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), for the purposes of a sewage farm, whereby the value of other parts of the land near to the part so taken was depreciated, even in the absence of any nuisance arising from the sewage farm when made:—

Held, that the owner of the estate was entitled to compensation under the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), s. 63, not only in respect of the land taken, but also for damage sustained by reason of the "injuriously affecting" the other lands by the exercise of the statutory powers.

RULE calling on the defendant to shew cause why a writ of certiorari should not issue to the clerk of the peace for Middlesex to remove into the Queen's Bench Division a writ of inquisition, verdict, and judgment had and taken before the sheriff of the county on the 2nd of July, 1884, touching the claim to compensation made by Thomas Christopher Cowper Essex for the purchase by the Acton Local Board of his interest in certain lands, and also for damage sustained or to be sustained by reason of the injuriously affecting of his other lands by the exercise by the local board of the powers of the Acts in such inquisition, verdict, and judgment mentioned or referred to, upon the ground of excess of jurisdiction.

The claimant was owner in fee of land at Acton which was laid out for building. Five acres of the land were taken by the Acton Local Board under statutory powers for the purposes of a sewage farm. The claimant took proceedings under the Lands Clauses Act, 1845, claiming compensation for his interest in the land taken, and also for the "injuriously affecting" of other parts of his land near, by the exercise of the statutory powers.

The claim was heard before the under-sheriff and a jury, when evidence was given that, even in the absence of any nuisance in fact arising from the sewage farm, there was a depreciation in the marketable value of other parts of the claimant's land,—one part separated from the land taken only by a railway, the other part close to, although not immediately adjoining, the land taken,—by reason of the sewage works. The under-sheriff asked the jury what they would award to the claimant, first, for the five acres of land taken, and, secondly, for the damage done to the remainder of his property by the erection or proposed erection of the sewage works; the jury awarded 8737*l.* for the land taken, and 4000*l.* compensation for such damage, and judgment was given accordingly.

E. Clarke, Q.C., and *C. H. Anderson*, shewed cause. The only question in dispute is as to the sum of 4000*l.* Part of the claimant's land having been taken for the sewage works and other adjacent parts of the land being "injuriously affected" thereby, he is entitled to compensation for the damage to such adjacent land: 8 & 9 Vict. c. 18, s. 63. As *In re Stockport, Timperley, and Altrincham Ry. Co.* (1), where a railway company took land of the claimant and proposed to make a railway on it so close to his cotton-mill that, by reason of the proximity of the railway and the danger of fire from trains, the building was less suitable for a cotton-mill, and could only be insured at an increased premium and was rendered of less saleable value, and the Court held that he was entitled to compensation in respect of the mill being so injuriously affected, and that the rule that compensation could only be given for that which unless sanctioned by the private statute would otherwise have been an actionable wrong, had no application to cases where the act complained of was done on the

(1) 33 L. J. (Q.B.) 251.

claimant's own land, taken from him by the company by force of their statute. That decision has never been overruled, but is supported by subsequent cases. Many of the authorities which may be cited for the local board on the question of injuriously affecting are distinguishable on the ground that no land of the claimant had been taken. *Hammersmith, &c., Ry. Co.* v. *Brand* (1), is so, as the Court pointed out in *Reg.* v. *Sheward* (2), and in *City of Glasgow Union Ry. Co.* v. *Hunter* (3) Lord Chelmsford said: "Even if the *Stockport Case* (4) should be taken to have been rightly decided, it is distinguishable from the present in an important particular, which appears to me to prevent its application" (5), and he afterwards said, "But the claim in the present case does not arise out of anything done on the land taken, nor in respect of any property of the respondent connected with the land so taken, but from the construction of a railway bridge over the land of another person, no connection existing between the front part of the respondent's premises, in respect of which compensation for damage has been given, and the back part, over a small portion of which the railway is made." (6) And in *Duke of Buccleuch* v. *Metropolitan Board of Works* (7), Lord Chelmsford, after referring to *Brand's Case* (1) and *Hunter's Case* (3), said, "In neither of these cases was any land taken by the railway company connected with the lands which were alleged to have been so injured, and the claim for compensation was for damage caused by the use and not by the construction of the railway. But if, in each of the cases, lands of the parties had been taken for the railway, I do not see why a claim for compensation in respect of injury to adjoining premises might not have been successfully made on account of their probable depreciation by passing trains. In this case (as I shall presently shew) land of the plaintiff was taken, which would have given a foundation for a claim to compensation for other lands injuriously affected." (8) Compensation was indeed given by the arbitrator in the *Duke of Buccleuch's Case* (7) for injury of the

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(1) Law Rep. 4 H. L. 171.
(2) 9 Q. B. D. 741.
(3) Law Rep. 2 H. L., Sc. 78.
(4) 33 L. J. (Q.B.) 251.
(5) At p. 81.
(6) At p. 82.
(7) Law Rep. 5 H. L. 418.
(8) Law Rep. 5 H. L. 418, at p. 458.

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same nature as in the present case. The arbitrator found the amenity of the house was affected by the noise and dust from the Thames Embankment. In the Court of Exchequer, Kelly, C.B., said (1), "It cannot be that the plaintiff is entitled to the same damages only, no matter whether something agreeable or convenient has been substituted for the former condition of his premises, or something such as a bank of mud, for example, which may be the subject of daily and hourly annoyance." And even Blackburn, J., the dissentient judge in the House of Lords, said, when the case was before the Exchequer Chamber (2), that the only case directly in point was that of *In re Stockport, &c., Ry. Co.* (3), and, after discussing it, stated his opinion that "in many cases, mischief arising from acts done on the land taken may give rise to a claim for compensation under the general words of s. 63, as causing damage analogous to and of the same nature as that arising from severance (4)," and he suggested a cutting made on land taken which would drain a well or weaken the support of the adjacent land, and added: "Probably the deterioration of the value of the other lands as building ground might be considered as arising from a cause ejusdem generis with that from severance. I am not prepared to say that even a loss of amenity might not sometimes be brought in." Mellor, J., said of the *Stockport Case* (3): "It has been already observed that in that case all the injurious or damnous consequences, in respect of which compensation was claimed, directly resulted from an act done on the land of the owner." (5) And see per Montague Smith, J. (6), who delivered the judgment affirmed by the House of Lords. Between the decisions in the Exchequer Chamber and the House of Lords, *Hunter's Case* (7) was decided. Nevertheless in the House of Lords, Hannen, J., said (8): "The second head of damage, namely, that resulting from the use of the embankment when made as a roadway, is the one on which the objection to the umpire's award has been chiefly based. Again, referring to the language of the 63rd section of the Lands Clauses

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(1) Law Rep. 3 Ex. 306, at p. 325.

(2) Law Rep. 5 Ex. 221.

(3) 33 L. J. (Q.B.) 251.

(4) Law Rep. 5 Ex. 221, at p. 243.

(5) At p. 249.

(6) At p. 251–2.

(7) Law Rep. 2 H. L., Sc. 78.

(8) Law Rep. 5 H. L. 418, 444.

Act, 1845, it is clear that the concluding words of the section give compensation not only for the damage sustained by reason of the severance of the lands taken from those left, but also for damage otherwise occasioned to the lands not taken, by the exercise of the powers of this Act."

It is suggested for the local board that there is no physical contiguity between part of the land in question and the land taken, but the owner has the fee of the whole and compensation may be given in respect of the lands "held therewith:" 8 & 9 Vict. c. 18, s. 49.

R. E. Webster, Q.C., and *Pollard*, in support of the rule. The land taken was let for ninety-nine years, and therefore the local board were only buying up the claimant's ground rent. He accepts the capitalized ground rent, and practically admits that nothing noxious will in fact result from the works proposed; but he claims for depreciation of the other land through the apprehension of purchasers that a nuisance may arise. That may be ground for opposition to the passing of the Act which empowers the acquisition of the land, but not for compensation. The *Stockport Case* (1) is not law; the *Duke of Buccleuch's Case* (2) was so involved in its various circumstances as to be no decision on the present point: see per Lord Blackburn in *Caledonian Ry. Co.* v. *Walker's Trustees.* (3) *Caledonian Ry. Co.* v. *Ogilvy* (4), and *Metropolitan Board of Works* v. *McCarthy* (5), shew that compensation is given for damage by construction and not by user of the works. The claimant's contention must be that there will be a user of the land taken, which, although not an actionable nuisance, entitles him to compensation. But the injurious affection must be that which, except for the statute authorizing the works, would be an actionable wrong. Damage by user in such cases must have been contemplated by the legislature, yet no compensation was prescribed for it: *Hammersmith District Ry. Co.* v. *Brand.* (6) The argument for the claimant ignores *Rex* v. *Pease* (7) and *Vaughan* v. *Taff Vale Ry. Co.* (8), which, although disapproved of by Lord Westbury and Lord Bramwell, have been recognised and affirmed in the subsequent cases. Suppose the board were liable in an action of trespass to the land taken, the damages here claimed as compensation for depreciation of adjacent land would be too remote to be recoverable.

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(1) 33 L. J. (Q.B.) 251.

(2) Law Rep. 5 H. L. 418.

(3) 7 App. Cas. 259, at p. 297.

(4) 2 Macq. 229.

(5) Law Rep. 7 H. L. 243.

(6) Law Rep. 4 H. L. 171.

(7) 4 B. & Ad. 30.

(8) 5 H. & N. 679.

Property may be depreciated by the proximity of a cemetery, a knacker's yard, or even a public-house, but if they are carried on so as not to be a nuisance, the owner of the adjoining land can maintain no action. The damage here simply proceeds from the name "sewage farm," as no nuisance will really be created. The distinction between lands taken and lands not taken is clearly explained in *Glasgow Ry. Co.* v. *Hunter* (1), which is conclusive.

In the *Duke of Buccleuch's Case* (2) the damage was from construction only, and the making of the embankment prevented the access of boats to the private jetty.

[MATHEW, J. Is there not in this case an alteration of the character of the estate, which is tantamount to damage by severance?]

No. The severance must be physical.

MATHEW, J. I am of opinion that this rule must be discharged, and that the claimant is entitled to the sum of 4000*l.* which by the inquisition and verdict is found to represent the damage sustained by him by reason of the injuriously affecting of lands, tenements, and hereditaments of the claimant, by the exercise by the board of the powers of the Acts in such inquisition mentioned or referred to. The case is important, and the point presented for our consideration was whether, if land was taken for a certain purpose authorized by the statute, that land forming part of an estate of a land proprietor, in assessing the damages arising from the taking of the land, it was or was not legitimate to take into account the purpose for which the land taken was to be used. The land in question has been taken possession of under compulsory powers by this local authority for the purpose of carrying out upon it a sewage farm. The land is part of a building estate belonging to the claimant. As

(1) Law Rep. 2 H. L., Sc. 78.

(2) Law Rep. 5 H. L. 418.

regards a part of the building estate it is physically severed from it by a railway running through it. As regards another part of the estate, the land in question is close to it, but not immediately contiguous, and the evidence given before the jury, and upon which they acted, was that as regards the remaining portion of the estate situated near the part taken by the board there was a depreciation of the marketable value of the property by the sum of 4000*l.* There was a property which was of uniform character before any part of it was taken by the board, and which was adapted and laid out for building purposes. What the board has done is to take a part of the land, and destroy it so far as it was available for building purposes; and it is said that while the owner of the property is entitled to compensation for the full value of the land, the jury or arbitrator who has to assess compensation ought not to look at the effect which the employment of the land taken for the purpose of a sewage farm would have on the adjoining property.

The language of s. 63 of the Lands Clauses Act would appear to me, notwithstanding the criticism to which that statute is exposed, free from all doubt. The section runs: "In estimating the purchase-money or compensation to be paid by the promoters of the undertaking . . . regard shall be had . . . not only to the value of the land to be purchased . . . but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special Act, or any Act incorporated therewith." Light is thrown upon the interpretation of that clause by s. 68 which follows, and by s. 49. If one had to interpret that Act for the first time, one would have said that it is perfectly clear that when property is taken to use for the purpose indicated by the Act under which the proceedings have taken place, the effect upon the marketable value of the remainder of the estate shall be considered. It only needs to be illustrated by a few simple instances to shew how manifestly the value of property in the neighbouring part of the same estate may be affected. If we suppose the land taken for the purpose of a cemetery, for the purpose of gas-works, for the purpose of chemical works, or even for the purpose of a railway, according to Mr. Webster's contention, compensation has to be assessed in any one of those cases precisely in the same way as if the land taken was to be laid out as pleasure grounds for the advantage of the whole of the neighbourhood.

In dealing with this question, various analogies have been referred to as illustrating what the position of the claimant is. It has been said that he ought to be treated as a willing vendor. Suppose that to be the correct view, although I do not say that it is, can anybody doubt that a man called upon to sell this property would necessarily take into account the effect of the user of the property for the purpose for which it was sold upon his adjoining estate? He would be foolish if he did not, because as this case shews—and the finding has not been disputed—the remaining property in this particular instance would be worth 4000*l.* less. Take the other case which has been offered as an illustration of the position of the claimant. Supposing he brought an action for what is done, treating the board as trespassers, as they undoubtedly would be if they did not possess statutory powers, can anybody doubt that it would be a perfectly legitimate head of damage, and fairly, and properly included in the measure of damages, if he was able to shew that the fact that the land was taken to be used for a particular purpose depreciated the value of his property which had formed part of the same estate? Take the simplest illustration of all. Suppose a railway passing through a field which was acquired or laid out for building purposes. Is the owner to be compensated merely for the value of so much of that field as is used for the railway? Is he not fairly entitled to ask the jury, or the arbitrator, to take into account the effect on the salvage—if I may so term it—the effect upon what is left, a portion having been taken for the purpose of a railway?

But the case, as we have good reason to know, is not without authority. We have had the case elaborately argued, and all the authorities referred to. Each learned counsel began at the *Stockport Case.* (1) According to my view of the law, the *Stockport Case* (1) has never been overruled. It has been exposed to criticism, principally because it was a very able judgment delivered a long time ago, and touched the question of compensation and the mode of assessment, but, although it has been criticised and its application to the particular case before the Court doubted, no Court, as far as I know, has ever pronounced that decision to be wrong, and if that decision be right and has not been overruled, it is authority in favour of the claimant. I hope I may without impropriety say that the judgment is one of the greatest authority, pronounced by a very eminent lawyer, and I think that I may say also, that it has been regarded by the profession hitherto as entitled to much respect.

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(1) 33 L. J. (Q.B.) 251.

I pass from that case and come to the next, *The Duke of Buccleuch's Case.* (1) That case seems to me to be a complete authority in favour of the claimant. It follows the *Stockport Case.* (2) In the case of the Duke of Buccleuch what was interfered with was clearly no more than an easement or quasi easement—the right of approach to the river; but, by the terms of the Act of Parliament, for the purposes of compensation that easement was to be treated as land. If I understand the judgments rightly, the Duke of Buccleuch was held to be entitled to compensation for any inconvenience to which he would be put by the construction of the roadway in front of his house, because that easement, treated as land, had been taken possession of by the Board of the Metropolitan Board of Works. The very large compensation given in that case proceeded, as I understand, entirely upon the principle laid down in the *Stockport Case.* (2)

But it is said that there is a case, also decided by the House of Lords, which qualified the *Stockport Case* (2) and must be acted upon as an authority in favour of the board here, notwithstanding the interpretation which, as it appears to me, we have a right to put upon the *Duke of Buccleuch's Case* (1), and that is *City of Glasgow Union Ry. Co.* v. *Hunter.* (3) In that case certain land had been taken for the purpose of a railway, and that land belonged to Hunter and was at the back of his house. Certain other land had been taken in front which did not belong to him, and the land used in front of his house, through the purpose for

(1) Law Rep. 5 H. L. 418.

(2) 33 L. J. (Q.B.) 251.

(3) Law Rep. 2 H. L., Sc. 78.

which it had been taken, was calculated to depreciate the value of Hunter's house, and he claimed compensation upon the authority of the *Stockport Case.* (1) But it was quite enough that the injury done to him was not by reason of that part of his land which was taken, and therefore he could no more claim than any other of those persons in front of whose houses the railway in question was constructed. Upon that ground it was held that Hunter was not entitled to compensation. But that case has no application to this, because the depreciation here is clearly referable to the use proposed to be made of the land which has been taken by the board.

Our attention has been called to dicta and decisions upon cases wholly different from this case—*McCarthy's Case* (2) and *Brand's Case* (3) and *Ogilvy's Case* (4), and it has been said that the result of those decisions is that you cannot compensate a man for damage done to his property arising from the ordinary uses of neighbouring land acquired under statutory powers. And, no doubt, that is the result of those decisions. You cannot. If the legislature chose to authorize the carrying on of a particular business in a particular way none of the public can complain of that. They are not protected by the Act. They are certainly not within the terms of the compensation clauses of these Acts. But it is said "Why should you allow for such damage in case any part of the land is taken?" I do not interpret the cases referred to in that way, or the dicta which have been relied upon. What I think was meant was, that where the sole subject of compensation was damage done by user justified by the statute, that of itself did not give rise to a proper claim for compensation. None of those cases appear to me either to deal or to be intended to deal with a case where land has been taken and where damage follows upon the user of that land to other land forming part of the same estate. If the legislature intended that no compensation should be given for such damage then this extraordinary consequence would follow, viz., that even if the land in question which has been taken by the board had been protected by its owner by a covenant that it should not be employed in any such way, and that covenant had obviously been entered into for the purpose of maintaining the value of the adjoining property, the board might take this land and make no compensation; but I cannot think that such was the intention, and I am not coerced by any authority to say so. I think the *Stockport Case* (1) a good authority, and I am bound by that, and therefore, in my judgment, the rule should be discharged.

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(1) 33 L. J. (Q.B.) 251.

(2) Law Rep. 7 H. L. 243.

(3) Law Rep. 4 H. L. 171.

(4) 2 Macq. 229.

DAY, J. I concur with my Brother Mathew in his judgment that this rule should be discharged, and also concur with him in the reasons which he gives for the judgment.

The case is one, no doubt, of considerable difficulty, and it has been argued, if I may say so, with great ability on both sides. Every possible suggestion has been made based upon the various cases which have been cited on one side and on the other, and every possible aid has been given to the Court in coming to a conclusion.

I do not entertain any doubt as to the judgment at which I have arrived, but I feel it very difficult to trace the judgment to the fundamental principle, and that difficulty really arises, as has been said more than once, from what I think to be an unfortunate decision arrived at many years ago in *Vaughan* v. *Taff Vale Railway* (2), and in the other case to which reference has been made (3). I think that those cases were decided upon a mistaken view of the statutes, and of the law created by them. I do not suppose for a moment that it was the intention of the legislature that persons constructing public works, whether for private advantage or for public benefit, were not to make compensation for consequential injuries done to private owners of property,—for injuries caused to them by the user of the land taken for the purpose of the various Acts. However, that has been decided to be law; it has been acted upon for a great number of years, and it is not to be disturbed. At the same time, as has been stated by Lord Bramwell and others, it has been the source of all the difficulty that arises in this case. Fortunately for the ends of justice, one exception seems to me to be quite as well established as is the general rule laid down in *Vaughan* v. *Taff Vale Railway.* (1) This great exception, and one which to my mind ought to be upheld, is, that where any portion of a man's land is taken he shall have full compensation for the injury that is done to him, although, if his land is not taken, then by reason of the decision in *Vaughan* v. *Taff Vale Railway* (1) he must submit to bear the loss, and can obtain no compensation whatever for it.

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(1) 33 L. J. (Q.B.) 251.

(2) 5 H. & N. 679.

(3) Semble, *Rex* v. *Pease*, 4 B. & Ad. 30.

In this case it seems to me to be perfectly clear that the plaintiff has sustained substantial injury to his property in this land by reason of the execution of the works of the company. A man's land may have a value quite independent of its own intrinsic value. Men may be prepared to sacrifice, and they constantly and most properly do sacrifice a portion of their land for the benefit of other portions of their land. Take the case, which I suggested in the course of the argument, of a person having a large building estate, who sacrifices a considerable part of that estate at a nominal rental on the terms that it is to be held and maintained as a pleasure-ground or as decorative land, so as to enhance the value of the rest of his property. It has been said, and necessarily said, by counsel on behalf of the public body in this case, that if that land held at a nominal rent is taken, the only compensation to be made is to be the capitalization of that nominal rent, and that the body who occupy the land under the powers of the Act of Parliament are to hold it free and discharged from all the other covenants of the lease. To my mind that is too gross an injustice to require more than to be stated in order to be refuted, because it is clear that the owner of the land sustains an injury by the loss of the land very different from the loss of rent. He loses the benefit of the covenant which he imposed upon the occupier of that land, by reason of which covenant his other estate and property has been greatly enhanced. Take the case of the land being converted into a cemetery, or any other generally unpleasant occupation. No doubt all the residences around would be seriously diminished in value, and if the owner got no compensation beyond the mere capitalized value of the nominal rent at which this land has been, so to say, sacrificed for the benefit of the other land, the public body, or the body acting under the Act of Parliament, would have the land free of all covenants except, as it seems, the covenant to pay rent. That seems to me very unreasonable. Take such a case as water flowing by underground courses, which supplies a mansion. Supposing the land where the springs are found was bought, the person buying the land could cut off the water from the mansion and affect the whole flow of the water of the land adjoining the mansion. No action would lie for that, no doubt, and therefore the owner would retain possession of the land, keep it himself, and not part with it for any consideration. The springs do not add to the intrinsic value of the land, and yet it seems very unreasonable to say that the land is to be sold for the mere intrinsic value and he is not to have compensation because if his land is taken there will be a stoppage of the water supply to the house; and therefore I can see the excellent ground that there is for the distinction, so long ago made and so constantly maintained, that where land is taken the persons taking it must pay for the injury which their works are calculated to do to the remaining land of the owner.

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(1) 5 H. & N. 579.

It has been said that the present case does not fall within the terms of the Act, and that the injury is not in the execution of the works. I am myself of opinion that it is, even in the strictest sense, in the execution of the works. It is clear to my mind that the injury in this particular case is done in the execution of the works reasonably understood, that is to say, in the execution of the works coupled with the necessary incidents of the works. People do not create works for sewage purposes unless they intend to use them for sewage purposes. We must look at sewage works—not as the mere erection of bricks and mortar, and so on, in the form of sewage works but—as being sewage works, with every ordinary incident natural to sewage works. In my opinion the proper view was taken of this case at the hearing before the under-sheriff. I cannot find that the jurisdiction was in any way exceeded in awarding compensation for the injury done to the remaining property—the building property—by a portion of the building property being used, not for building purposes, but for the purpose of carrying out upon those premises what are called sewage works. I am therefore clearly of opinion that the

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inquisition was correctly held, and that this rule should be discharged.

Rule discharged, with costs.

Solicitors for claimant: *Hedges & Brandreth.*
Solicitor for local board: *Helmsley.*

J. R.

Dec. 3.

[IN THE COURT OF APPEAL.]

M'ILWRAITH AND OTHERS v. GREEN AND ANOTHER.

Practice—Payment into Court—Denial of Liability—Action for several Breaches of Contract—Payment into Court in respect of One Breach—Acceptance in Satisfaction of all Demands—Rules of the Supreme Court, 1883, *Order XXII., rr.* 6, 7.

In an action for breach of contract assigning two distinct breaches, the defendants pleaded denying the breaches, and alternatively paid money into Court with regard to one of the breaches. The plaintiffs gave notice under Order XXII., rule 7, that they accepted the money paid into Court in full satisfaction of the causes of action in the statement of claim:—

Held, that the plaintiffs were entitled, without proceeding to judgment, to their costs of the action; for by accepting the money paid into Court in satisfaction of all their alleged causes of action they had in effect discontinued or withdrawn the action as to the breach, in respect of which the money was not paid in.

Decision of the Queen's Bench Division (13 Q. B. D. 897) affirmed.

APPEAL by the defendants from an order of Pollock, B., and Lopes, J., setting aside an order of Smith, J., made at chambers.

The facts of the case are set forth in the report of the proceedings before the Queen's Bench Division (1), and it will be here sufficient to make the following short statement of them.

The action was brought for a breach of contract, and in the statement of claim two breaches were assigned. The defendants denied the breaches, but in the alternative paid a sum of 175*l.* into court in respect of the first breach. The plaintiffs gave notice that they accepted the sum of 175*l.* paid into court "in full satisfaction of the causes of action in the statement of claim mentioned." The plaintiffs thereupon applied to Smith, J., at chambers for an order for the taxation of the plaintiffs' costs

(1) 13 Q. B. D. 897.

of the action, but the learned judge refused the application. The plaintiffs appealed to Pollock, B., and Lopes, J., sitting in the Queen's Bench Division, who rescinded the order of Smith, J. (1) The defendants appealed to this Court.

Bucknill, (*Finlay, Q.C.*, with him), for the defendants. The plaintiffs are not entitled to have their costs taxed. *Crosland* v. *Routledge* (2), decided by Field, J., at chambers, is an authority strongly in point for the defendants: it follows from that case that the action must proceed in order to determine the liability of the parties as to the second breach. The plaintiffs cannot be entitled to the costs occasioned by their wrongfully alleging the second breach. No doubt the payment into court is in itself a substantive defence: *Wheeler* v. *United Telephone Co.* (3); but it is in the present action pleaded to only one breach. The plaintiffs by confessing the defence to the first breach, cannot get rid of the defence as to the second breach; the defendants are entitled to say that an issue must be taken on that second breach, and that if it is decided in their favour they are entitled to the costs of the action. The plaintiffs ought at least to have discontinued or withdrawn in express terms the action as to the second breach.

Moulton, for the plaintiffs.

Brett, M.R. In this case the plaintiffs have sued for several breaches of one contract. The defendants have denied the breaches alleged by the plaintiffs, but they have pleaded also a payment into court in respect of one breach. The plaintiffs have accepted the money paid into court "in full satisfaction of the causes of action in the statement of claim mentioned:" they accept the money in satisfaction of all the causes of action upon which they at first relied. I think that the case is the same as if the plaintiffs had sued for several distinct causes of action, and as if the defendants had paid money into court in respect of one of them, which the plaintiffs accepted in satisfaction of all the causes of action. It may be said for the plaintiffs that what they have done is equivalent to a notice, that they do not intend to

(1) 13 Q. B. D. 897.

(2) W. N. 1883, p. 228.

(3) 13 Q. B. D. 597.

proceed with any of the causes of action; but for the defendants it has been urged that the plaintiffs ought, in express terms, to have abandoned the prosecution of all the causes of action, and that they ought to have given a notice of discontinuance or withdrawal of that breach, in respect of which the money was not paid in by the defendants. If we look at the pleadings from a business-like point of view, what is the difference between, on the one hand, the notice actually given by the plaintiffs, and, on the other, a notice that they accept the money in satisfaction of the breach in respect of which it is paid in, and that they discontinue the action in respect of the other breach? It seems to me that the notice actually given by the plaintiffs and the notice in the form suggested are exactly equivalent. The nature and effect of a discontinuance are now ascertained by Rules of the Supreme Court, Order XXVI., r. 1. I agree with the judgment of the Queen's Bench Division, and I dissent from the view of Field, J., in *Crosland* v. *Routledge*. (1) What the plaintiffs have done is equivalent to an acceptance of the payment into court in respect of the one breach, and a discontinuance of the action in respect of the other breach. When the costs are taxed, the plaintiffs must not be paid in respect of the causes of action which they have abandoned: they must be paid costs only in respect of the breach as to which they have succeeded; and if the defendants have been put to any unnecessary costs by the course which the plaintiffs have taken, they must be reimbursed those costs.

Lindley, L.J. I am of the same opinion. I cannot agree with the view of Field, J. It is not necessary to go down to trial in order to dispose of the liability of the parties. It is not now desired to try the question, in respect of which the action was originally brought. The notice given by the plaintiffs is in substance a discontinuance or withdrawal of the second breach; nothing remains to be tried, and no party now wishes the action to be tried as to the merits.

Appeal dismissed.

Solicitors for plaintiffs: *Davidson & Morriss.*

Solicitors for defendants: *Stokes, Saunders, & Stokes.*

(1) W. N. 1883, p. 228.

J. E. H.

[IN THE COURT OF APPEAL.]

1885
March 7.

BARKER *v.* LAVERY.

Practice—Appeal—Appeal to House of Lords—Stay of Execution—No Special Grounds alleged.

Execution for costs pending an appeal from the Court of Appeal to the House of Lords will not be stayed, unless evidence be adduced to shew that the respondent to the appeal will be unable to repay the amount levied by execution, if the appellant be successful before the House of Lords.

Application of the defendant for stay of execution for costs pending an appeal to the House of Lords. The appeal was heard in this Court on the 23rd of February. The application was made by way of original motion.

Beddall, for the defendant. In order to obtain a stay of execution, the defendant is willing to pay the amount in dispute into Court.

[Brett, M.R. This Court has on previous occasions refused to stay execution pending an appeal without evidence of special circumstances.

Earl of Selborne, L.C. Are there any circumstances in evidence to shew that the plaintiff, if he is defeated in the House of Lords, will be unable to pay back the money levied by execution against the defendant ?]

The defendant is not now prepared with an affidavit to that effect; and it is submitted that *Merry* v. *Nickalls* (1), *Morgan* v. *Elford* (2), and *Wilson* v. *Church* (3), all shew that no evidence as to the means of the respondent to the appeal is necessary. But at all events time ought to be granted to the defendant to enable him to file an affidavit as to the plaintiff's means: the defendant believes that he can obtain evidence to shew that the plaintiff is not in a position to repay any sum, which he may levy by execution.

A. J. Ashton, was not called upon to argue for the plaintiff.

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(1) Law Rep. 8 Ch. 205.

(2) 4 Ch. D. 352.

(3) 12 Ch. D. 454.

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EARL OF SELBORNE, L.C. The defendant is not entitled to have the application granted as a matter of course. Evidence ought to have been adduced to shew, that the plaintiff would be unable to repay the costs if he should be unsuccessful before the House of Lords. As to the request for time to make an affidavit about the plaintiff's means, we cannot accede to it; those, who apply for a stay of execution, must come before us prepared with all necessary materials.

BRETT, M.R. I am glad to find that the practice prevailing in this Court is now supported by the authority of the Lord Chancellor.

LINDLEY, L.J., concurred.

Application refused.

Solicitors for plaintiff: *Goodhart & Medcalf.*
Solicitors for defendant: *Lumley & Lumley.*

J. E. H.

1884
Oct. 27.

[IN THE COURT OF APPEAL.]

THE MERSEY DOCKS AND HARBOUR BOARD, APPELLANTS; THE OVERSEERS OF LLANEILIAN, RESPONDENTS.

Poor-rate—Rateable Value—Mersey Docks and Harbour Board—Rateability of Lighthouse vested in and under the Management of the Board—Telegraph Station and Premises—Rateable Value enhanced by Reason of Neighbourhood—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), s. 430.

The Mersey Docks and Harbour Board were possessed of a tower used as a lighthouse and also as a telegraph station, in respect of which they received tolls from vessels using their docks or entering the port of Liverpool, which tolls were directed by the statutes under which the board derived their authority to be so fixed, that, with the other receipts of the board applicable to conservancy purposes, they should not be higher than were necessary to meet the conservancy expenditure:—

Held, that, inasmuch as the tower was incapable of profitable occupation, it was not rateable to the relief of the poor.

Two dwelling-houses adjoining the tower were used by the light-keepers, and if not so used in connection with the lighthouse might be let to tenants at a rent, and the rent would be enhanced by the fact that they had been built in the neighbourhood of the tower:—

Held, that the rateable value of the dwelling-houses must be ascertained with reference to the fact, that they had been built in the neighbourhood of the tower.

By Lord Coleridge, C.J., and Mathew, J., sitting as judges of the Queen's Bench Division, the lighthouses which are exempted from rating by s. 430 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), are those only, the superintendence and management of which is by s. 389 vested in the Trinity House, the Commissioners of Northern Lighthouses, and the Port of Dublin Corporation, and not lighthouses under the control and management of local authorities, such as the Mersey Docks and Harbour Board.

SPECIAL CASE stated pursuant to a judge's order.

1. In August, 1879, the respondents made a supplemental valuation list of rateable hereditaments in the parish of Llaneilian, in the county of Anglesea, and therein assessed the appellants as follows:—

Name of Occupier.	Name of Owner.	Description of Property.	Name or Situation of Property.	Estimated Extent.			Gross Estimated Value.	Rateable Value.
				A.	R.	P.		
Mersey Docks and Harbour Board.	Mersey Docks and Harbour Board.	Lighthouse, telegraph station, houses, buildings, and land.	Point Lynas.	15	2	25	£305	£244
Ditto.	Ditto.	Ditto.	Old telegraph office.	..			£4	£3

The assessment committee of the Anglesea union confirmed the assessment.

2. On the 19th of May, 1882, the respondents made a poor-rate in accordance with the supplemental valuation list. The appellants duly gave notice of appeal to the general quarter sessions for Anglesea. Judgment was to be entered by the Court of quarter sessions in conformity with the decision of this Court hereon, and for such costs as this Court should adjudge, &c.

3. Prior to the year 1857, the docks at Liverpool were vested in the corporation of that borough under the name of The Trustees of the Liverpool Docks, and were under the management of a board called The Liverpool Dock Committee. The trustees

were impowered to levy dues on vessels entering the port of Liverpool, and (amongst others) harbour and light dues for the maintenance of the buoys, landmarks, and telegraphs within the port, and for the expense of lights and life-boats, and the expenses of the office of marine surveyor of the trustees, and towards the improvement of the port in any other respect except the construction and maintenance of the docks. The trustees for many years collected and expended such dues accordingly.

4. The appellants were incorporated as a body of public trustees by the Mersey Docks and Harbour Act, 1857 (1), and, amongst other matters, the property, powers, rights, and privileges of the Liverpool Dock Trustees, including the right to levy dues, &c., and all such powers of exercising jurisdiction over the navigation or in respect of the conservancy of the river Mersey as were then vested in or exerciseable by the corporation, were thereby transferred to the appellants, who became possessed thereof subject to the provisions of that Act, upon the trusts and for the purposes, upon and for which such property, powers, rights, and privileges were held previously to the commencement of that Act. The appellants are now regulated by the Act of 1857, the Mersey Docks Acts Consolidation Act, 1858 (2), the Mersey Docks (Ferry Accommodation) Act, 1860 (3), the Mersey Docks (Various Powers) Act, 1867 (4), the Mersey Docks (Liverpool River Approaches) Act, 1871 (5), the Mersey Docks Act, 1874 (6), and other statutes. These Acts were to be taken as part of the case.

5. By s. 54 of the Act of 1857, the following accounts were to be kept separately, and were to be dealt with as distinct sources of income and expenditure, that is to say,—

(1.) " An account of all sums received and disbursed by the board in respect of the following matters, and hereinafter called 'conservancy receipts' and 'conservancy expenditure,' that is to say, in respect of the maintenance of buoys, landmarks, and telegraphs, the expense of lights and life-boats, the expense of the marine surveyor, the expenses to be incurred as hereinafter mentioned with the consent of the commissioners for the conservancy of the river Mersey in improving of the port of Liverpool or the navigation of the river Mersey, the expenses to be incurred in the exercise of the jurisdiction hitherto vested in the corporation of appointing a water-bailiff and removing sunken vessels and other impediments to the navigation:

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(1) 20 & 21 Vict. c. clxii.
(2) 21 & 22 Vict. c. xcii.
(3) 23 & 24 Vict. c. cl.
(4) 30 & 31 Vict. c. ccvi.
(5) 34 & 35 Vict. c. cxcvii.
(6) 37 & 38 Vict. c. xxx.

(2.) "An account of all sums received and disbursed by the board in the exercise of the powers hitherto vested in the Liverpool pilotage commissioners, hereinafter called 'Pilotage receipts' and 'Pilotage expenditure:'

(3.) "An account of all other sums received and disbursed by the board in pursuance of this Act, and hereinafter called 'General receipts' and 'General expenditure.'"

By s. 55 of the same Act, "the board may, with the consent of the conservancy commissioners, apply any portion of their general receipts, after providing for the expenses and charges incidental to the Mersey Dock Estate, in improving the port of Liverpool or the navigation of the river Mersey: they may also increase or diminish and again increase any rates or dues leviable by them in pursuance of this Act, either generally or in respect of any particular articles."

And by s. 56 of the same Act "the following rules shall be observed by the board with respect to the moneys received by them under this Act, that is to say,—

(1.) "The conservancy expenditure shall be defrayed out of the 'conservancy receipts:'

(2.) "The pilotage expenditure shall be defrayed out of the 'pilotage receipts:'

(3.) "No portion of the conservancy receipts or pilotage receipts shall be applied in aid of the general expenditure:

(4.) "No sums shall be payable in respect of docks by any vessel that does not use the same:

(5.) "Save as by this Act provided, no moneys receivable by the board shall be applied to any purpose unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes."

6. Certain lighthouses, lightships, buoys, beacons, landmarks, seamarks, and life-boats, and life-boat houses theretofore established, became vested in the appellants on their incorporation, to be maintained and worked by them.

By s. 104 of the Act of 1858, the appellants were impowered, when and as they should deem it expedient for the protection of navigation to and from the port of Liverpool, to purchase or hire land in convenient situations either within the port or on the coast adjoining the same, or elsewhere, for the erection of lighthouses, landmarks, and life-boat houses, and to erect the same thereon, and to maintain, alter, and improve, or take down the same when built, and also those already built by or vested in them.

And by s. 106 of the same Act the appellants were impowered in their discretion to establish and maintain, and to alter or remove floating lightships, buoys, beacons, and seamarks in or near the sea channels or other places within or near the port of Liverpool; subject, however, as to the erection or removal of lighthouses and the placing or removal of lightships, buoys, beacons, and seamarks, to the sanction of the Trinity House. Under the said Acts and the Merchant Shipping Act, 1854, s. 394, the appellants may not discontinue any of their lighthouses without the sanction of the Trinity House.

By s. 109 of the same Act the appellants were required to provide and maintain such and so many life-boats or other vessels to be used and established for the purpose of rendering assistance to vessels in distress, as they might from time to time think necessary or expedient.

7. Also, at the time of the said incorporation a system of telegraphs theretofore established for the information and benefit of shipping navigating the port of Liverpool became vested in the appellants, to be maintained and worked by them. And by s. 110 of the same Act of 1858 the appellants were impowered to extend, maintain, and improve that system.

8. By an agreement dated the 1st of October, 1870, made between Her Majesty's Postmaster-General and the appellants, the Postmaster-General acquired the appellants' line of telegraphs as then established between Birkenhead and the South

Stack, Holyhead, and undertook to maintain a wire for the exclusive use of the board for telegraphic communication between Birkenhead and the South Stack, with connections to all the telegraph stations of the board on the said line; but the said stations and the premises connected therewith were not transferred to the Postmaster-General with the said line, but continue to be the property of the appellants, and the keepers of such stations remain under the control of and are paid by the appellants.

9. By s. 11 of the Mersey Docks Act, 1874, the appellants have power to destroy or remove sunken vessels or other impediments to navigation within the port of Liverpool or any of the sea channels leading thereto, and are authorized to sell any property so raised or removed and to retain the expense of the work out of the proceeds of sale.

10. By s. 238 of the Act of 1858, certain rates called harbour-rates specified in schedule D to that Act were made payable to the appellants in respect of all vessels coming into or going out of the port of Liverpool and not entering into the docks, according to their tonnage burthens and to their respective voyages.

By s. 3 of the Mersey Docks Act, 1874, the harbour-rates set forth in the schedule to that Act were substituted from and after the 1st of October, 1874, for the rates in schedule D to the Act of 1858; and it was provided that the appellants might when and as they should deem it expedient so to do from time to time lower and again advance these rates, but so that the same should never exceed the amounts mentioned in the schedule to that Act, and so that the same when so lowered or advanced should not be, with the other receipts of the board, applicable to conservancy account, higher than was necessary for the purpose of conservancy expenditure.

The harbour-rates actually levied have been about one half of those mentioned in the said schedule.

11. By s. 230 of the Act of 1858, certain dock tonnage-rates shewn in schedule B to that Act were made payable to the appellants on all vessels entering into or leaving the docks, according to their tonnage burthens and according to their respective

voyages. These rates included dock-dues, lighthouse-dues, and floating light dues, as shewn in the schedule.

By s. 270 of that Act the appellants were impowered from time to time to lower all or any of the rates mentioned in schedule B, and again to advance them.

The lighthouse-dues and floating light dues included in the dock tonnage-rates were kept separate from the dock-dues, and were carried to conservancy account, and applied for conservancy purposes; but by s. 5 of the Act of 1874, it was provided that they should no longer be so dealt with, and should be deemed part of the receipts applicable to the general expenditure, but that the appellants from and out of the dock tonnage-rates becoming payable from and after the 1st of October, 1874, in respect of each vessel entering into or leaving the docks from or upon any voyage, should provide and apply for conservancy purposes an amount per ton of such vessel equal to the amount per ton for the time being payable under that Act for harbour-rates for the same voyage, and that such amounts (thereinafter referred to as "the conservancy portion of the dock tonnage-rates") should be carried to the credit of the conservancy account thereinafter mentioned: provided always that nothing in that Act contained should prejudice or affect the powers of the appellants, in relation to levying, raising, or lowering all or any of the dock tonnage-rates.

12. By s. 6 of the Act of 1874, "from and after the passing of this Act, all sums received by the board in respect of harbour-rates and the conservancy portion of the dock tonnage-rates, whether under the Act of 1858 or under this Act, and all sums disbursed by the board in respect of conservancy expenditure, as defined by s. 54, subs. 1, of the Act of 1857, shall be deemed to be conservancy receipts or conservancy expenditure, as the case may be, and shall be accordingly thenceforward included in the separate account of conservancy receipts and conservancy expenditure, which by that section the board are required to keep; and such account shall be called the conservancy account."

13. The harbour-rates and conservancy portion of dock tonnage-rates are carried to the separate conservancy account as directed by the said statutes, and are expended for conservancy purposes,

by distinct departments of the appellants' administration, under officers called the marine surveyor and the water-bailiff. With the exception of expenses received in the manner mentioned in par. 9, these are the only moneys received by the appellants in respect of those parts of their estate which are used for conservancy purposes.

14. All the accounts of the appellants are annually audited by a special auditor appointed for the purpose by the Board of Trade under s. 8 of the Mersey Docks Act, 1867; and by s. 8 of the Mersey Docks Act, 1874, the auditor is to appoint a day for the audit of the conservancy accounts, and is to give not less than seven days' notice of the day so appointed.

The duties of the auditor are pointed out by s. 9.

There is no permanent debt incurred on conservancy account, though the account is occasionally in arrear owing to larger expenses than usual being incurred in the erection of lighthouses and the undertaking of other structural works. On the 1st of July, 1881, there remained in hand a surplus of conservancy receipts over conservancy expenditure amounting to 22,875*l.* The conservancy expenditure for the year preceding was 26,294*l.*, and the receipts 44,430*l.* (including a balance of 5782*l.* carried forward on the 1st of July, 1880). The surplus or deficit on the account in any year is carried forward to the same account in the year following.

16. The lighthouse at Point Lynas, on the north coast of the island of Anglesea, in respect of which the appellants have been assessed as aforesaid, is one of the lighthouses which were maintained by the trustees of the Liverpool Docks, and the lease of which, for a term of twenty-one years expiring in 1863, became vested in the appellants on their incorporation. The appellants have always since worked and maintained the lighthouse for the convenience and safety of ships frequenting the port of Liverpool; but the light is also of use to other vessels navigating the eastern parts of the channel.

17. Prior to 1872, poor-rates were paid in respect of the lighthouse and lightkeeper's house upon an assessment of 12*l.*, and from 1872 to 1877 (when the present dispute first arose) upon an assessment of 20*l.*, and from 1877 to 1879 upon an assessment of

50*l.*, net rateable value. None of the private Acts by which the appellants are regulated contain any express provision exempting the lighthouse or the other assessed premises from the payment of poor-rates.

18. Between November, 1877, and August, 1879, the appellants purchased the freehold of the site of the lighthouse and of some adjoining land, together about sixteen acres, at a cost of about 3000*l.*, and they spent a sum of about 5600*l.* in structural improvements of the lighthouse, in constructing new lighting apparatus, and in erecting two four-roomed houses for the light-keepers, and a stable. The two houses are in an exposed situation, and, partly on that account, and partly with a view to make a handsome group of buildings, they were built more substantially and expensively than ordinary dwelling-houses with similar accommodation usually are. The houses, stable, and land, if not used in connection with the lighthouse, might be let by the appellants to other tenants at a rent.

19. The lighthouse consists of a tower and a dwelling-house adjoining. In the tower is the light-room, which contains the flash-light with clock-work for regulating the flash, all fitted on cast-iron columns and on a circular cast-iron base for the light attached to the freehold, and also a room used for working a telegraph-wire which is one of the connections of the wire from Birkenhead to the South Stack, Holyhead, maintained by the Postmaster-General for the exclusive use of the appellants, as mentioned in par. 8. The said room is one of the telegraph-stations of the appellants within the meaning of the agreement referred to in par. 8, and the telegraph-wire therefrom is worked by them as mentioned in paragraphs 7 and 8. The dwelling-house adjoining the tower and the other premises are occupied by the light-keepers as servants of the appellants.

20. The working and maintenance of the light and telegraph at Point Lynas form part of the appellants' conservancy duties, and the expenses thereof are defrayed out of the conservancy receipts above-mentioned. All the purchases, additions, and improvements referred to in par. 18 have been paid for out of the same conservancy funds, as have also certain new lighthouses erected by the appellants on or near the river Mersey. Apart

from those receipts, nothing is paid by any person to the appellants or to any other person in respect of the said light or telegraph, or in respect of any of the premises assessed as aforesaid.

21. The tower of the lighthouse has no occupation value except as a lighthouse and as a telegraph station; and the appellants under the present circumstances are the only persons to whom it is of value for those purposes. The appellants contend that it is not rateable, on the grounds that it is exempted by s. 430 of the Merchant Shipping Act, 1854, and that it is not and cannot be the subject of any beneficial occupation; and they contend that the premises other than the tower ought to be assessed upon their value to be let from year to year, supposing they were not used for the light or telegraph, but were disconnected therefrom and applied to any other purposes for which they might be available.

22. The respondents contend that the whole of the premises ought to be assessed upon their existing value to the existing occupiers.

If the Court should be of opinion that the appellants were rateable in respect of the tower and the other premises as used at present for and in connection with the light and telegraph, the present assessment of the appellants' premises was to stand. If in respect of the tower as a telegraph station only, and not as a lighthouse, and the other premises at their value as now used and occupied, the gross estimated rental was to be reduced to 120*l.*, and the rateable value to 96*l.* If in respect only of the premises other than the tower at their value as now used and occupied, the gross estimated rental was to be reduced to 95*l.*, and the rateable value to 76*l.* But, if the appellants are rateable in respect only of the premises other than the tower upon their value supposing they were not used for the light or telegraph, but were disconnected therefrom, then the gross estimated rental was to be reduced to 45*l.*, and the rateable value to 40*l.*

The case was argued on the 10th of March, 1884, before Lord Coleridge, C.J., and Mathew, J., by *Carver* (*Bigham* with him), for the appellants, and by *F. Marshall*, for the respondents.

It was contended for the appellants that the lighthouse in question being held by them as the harbour authorities, and not being susceptible of profitable occupation, was not rateable to the relief of the poor. The following authorities were cited,—*Lewis* v. *Overseers of Swansea* (1); *Mersey Docks* v. *Cameron* (2); *Mayor of Lincoln* v. *Holmes Common* (3); *Reg.* v. *Metropolitan Board of Works* (4); *Metropolitan Board of Works* v. *Overseers of West Ham* (5); *Mayor, &c. of London* v. *Stratton* (6); *Worcester (Corporation)* v. *Droitwich Assessment Committee* (7); *Hare* v. *Overseers of Putney.* (8) It was further submitted that "lighthouses" are expressly exempted from rating by s. 430 of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104, which enacts that "all lighthouses, buoys, beacons, and light-dues, and all other rates, fees, or payments accruing to or forming part of the said fund (9), and all premises or property belonging to or occupied by any of the said general lighthouse authorities or the Board of Trade, which are used or applied for the purposes of any of the services for which such dues, rates, fees, and payments are received, and all instruments or writings used by or under the direction of any of the said general lighthouse authorities or the Board of Trade in carrying on the said service, shall be exempted from all public, parochial, and local taxes, duties, and rates of every kind."

For the respondents were cited *Leith Harbour Commissioners* v. *Inspector of Poor* (10); *Greig* v. *University of Edinburgh* (11); *Grand Junction Canal Co.* v. *Hemel Hempstead Overseers* (12); *Blyth Harbour Dock Co.* v. *Tynemouth Union.* (13) And it was submitted that s. 430 of the Merchant Shipping Act, 1854, applied only to tolls of lighthouses which are placed under the control of the Trinity House, the Commissioners of Northern Lighthouses, and the Port of Dublin Corporation, by s. 389 of the Merchant Shipping Act, 1854 (which are by s. 417 to be carried to the "Mercantile Marine Fund"), and not to those lighthouses which are under the management of local authorities, as the lighthouse in question was. And it was further submitted that the appellants were at all events rateable in respect of their occupation (which was found to be a beneficial one,) of the lighthouse tower as a telegraph station, as well as in respect of the houses occupied by them or their servants in connection therewith.

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(1) 5 E. & B. 508; 25 L. J. (M.C.) 33.

(2) 11 H. L. C. 443.

(3) Law Rep. 2 Q. B. 482.

(4) Law Rep. 4 Q. B. 15.

(5) Law Rep. 6 Q. B. 193.

(6) Law Rep. 7 H. L. 477.

(7) 2 Ex. D. 49.

(8) 7 Q. B. D. 223.

(9) The "Mercantile Marine Fund," see s. 417.

(10) Law Rep. 1 H. L. (Sc.) 17.

(11) Law Rep. 1 H. L. (Sc.) 348.

(12) Law Rep. 6 Q. B. 173.

(13) Glen's Poor Law Statutes, 40.

Carver, in reply, referred to *New Shoreham Commissioners* v. *Overseers of Lancing* (1) and *Mersey Docks and Harbour Board* v. *Overseers of Birkenhead.* (2)

LORD COLERIDGE, C.J. We will take time to look into the cases referred to in this Court, to see if we can find any sound distinction between them and the present case: and, if we cannot, we will yield to them simply as authorities.

Cur. adv. vult.

May 30, 1884. The judgment of the Court (LORD COLERIDGE, C.J., and MATHEW, J.) was delivered by

MATHEW, J. The assessment appealed against seems to have been made on a calculation of what a landlord might charge by way of rent for the premises rated, and not upon an estimate of the rent at which the premises might reasonably be expected to let from year to year: and we are of opinion that the assessment cannot be maintained.

It appears from the statements in the special case that the funds out of which the lighthouse and adjoining premises have been acquired and are maintained, are chiefly obtained from tolls levied by the appellants under their statutory powers upon vessels using the Mersey Docks or entering the port of Liverpool. These tolls are directed to be so fixed that, with the other receipts of the appellants applicable to conservancy purposes, they shall not be higher than is necessary for conservancy expenditure. No profits are therefore receivable by the appellants from the occupation of any of the property in question; and, if none of the property rated were capable of being used except upon the condition imposed on the appellants, it would seem that no assessment could be made: see *Corporation of Worcester* v. *Droitwich Assessment Committee.* (1) But, as has been settled by the well-known decisions cited in the course of the argument,—*Mersey Docks* v. *Cameron* (2), *Greig* v. *University of Edinburgh* (3), *The St. Thomas's Hospital Case, Mayor, &c. of London* v. *Stratton* (4),—the fact that profits are not earned by the appellants would not extinguish the rateable character of the premises in question, if it could be shewn that the property was capable of being beneficially occupied in the hands of a tenant from year to year. The question, therefore, seems to be whether any and if any what portion of the property is thus capable of a beneficial occupation.

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(1) Law Rep. 5 Q. B. 489.

(2) Law Rep. 8 Q. B. 445.

With respect to the tower, even if the tolls were received in Liverpool as part consideration for the maintenance of the lighthouse, it would seem that the payment would not be a ground for treating this part of the property as rateable: see *Rex* v. *Coke.* (5) But the tolls are not so receivable. The lighthouse is a charge upon the funds created by the appellants' statutes. It represents, not income, but expenditure. In the hands of an ordinary tenant, it would yield no return, and would be incapable of profitable occupation as a lighthouse. That it represented an outlay of capital would not render it assessable any more than the property of an analogous character held not to be rateable in *Reg.* v. *Metropolitan Board of Works* (6) and *Metropolitan Board of Works* v. *Overseers of West Ham.* (7)

But the lighthouse is also used as a telegraph station, and for that purpose it seems to have been found as a fact that it is capable of beneficial occupation. In this respect, upon the authority of the decisions last referred to, it would seem to be rateable; and the rateable value, we gather, has been fixed at 96*l.* We see no reason for differing from this conclusion.

Then, with respect to the adjoining houses, it seems also to have been found as a fact that their value is enhanced from their being used in connection with the tower: and we think that the assessment made on this footing should stand at the rateable value of 76*l.*

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(1) 2 Ex. D. 49.

(2) 11 H. L. C. 443.

(3) Law Rep. 1 H. L. (Sc.) 348.

(4) Law Rep. 7 H. L. 477.

(5) 5 B. & C. 797; 8 D. & R. 666; and see *Rex* v. *Rebowe*, Loft, 77, and see Cald. 155, 351; *Rex* v. *Tynemouth*, 12 East, 46; *Rex* v. *Fowke*, 5 B. & C. 814.

(6) Law Rep. 4 Q. B. 15.

(7) Law Rep. 6 Q. B. 193.

It remains to deal with the point which was made, but not much insisted upon, by the learned counsel for the appellants, viz. that the property was exempt from being rated under s. 430 of the Merchant Shipping Act, 1854, 17 & 18 Vict. c. 104. It seems clear that the Act only applies to lighthouses in charge of the general lighthouse authorities referred to in the statute, and not to those which, like the lighthouse at Point Lynas, are under the control of a local authority.

We direct the rate to be corrected in accordance with our judgment, without costs.

Judgment accordingly.

J. S.

The Mersey Docks and Harbour Board appealed from the judgment of the Queen's Bench Division so far as it directed the rate to stand in respect of the tower as a telegraph station at a rateable value of 96*l.* or at any rateable value whatever, and so far as it directed the rate to stand in respect of the adjoining houses and premises at a rateable value of 76*l.*, or at any rateable value higher than 40*l.*; and the overseers of Llaneilian gave notice of their intention to move in the Court of Appeal that the rate appealed against should be ordered to stand.

Oct. 25, 27. *Bigham, Q.C.*, and *Carver*, for the Mersey Docks and Harbour Board. The judgment of the Queen's Bench Division is erroneous: it was not intended that under any circumstances the tower should be rated as a telegraph station at 96*l.* and the other premises at 76*l.*; these assessments were intended to be alternative, and cannot both stand.

[*McIntyre, Q.C.*, for the overseers of Llaneilian, assented to this.]

No regard is to be paid to the fact that the tower is used in conjunction with other property situate out of the parish: it must be rated in the parish upon an estimate of what its value in the parish would be, if it were disconnected from all other property: *New Shoreham Harbour Commissioners* v. *Lancing.* (1) The tower ought not to be rated at 96*l.* or at any other amount; its rateable value is nothing, because it cannot be used as a lighthouse or telegraph station by any person save the Mersey Docks and Harbour Board. The property appears to have been assessed on the basis of its worth to a landlord or owner; but this principle is plainly erroneous: *Overseers of Chorlton* v. *Guardians of Chorlton Union* (1); it is the hypothetical tenant who is to be considered, and the property is to be assessed on an estimate of what a tenant would give for it: *Metropolitan Board of Works* v. *West Ham.* (2) The judges of the Queen's Bench Division were of opinion that the tower is not rateable as a lighthouse, because it is incapable of profitable occupation; and for the same reason it is not rateable as a telegraph station: no profit can be earned from it. The suggested rateable value of 76*l.* is formed upon an estimate of the worth of the dwelling-houses and other premises (except the tower) to the Mersey Docks and Harbour Board under the conditions and circumstances, under which they are now used; but an assessment at this amount cannot be maintained because the dwelling-houses and other premises, being used for purposes connected with the tower, are not capable of a profitable occupation for the purposes of rating. The argument for the Mersey Docks and Harbour Board may go to shew that they are not rateable at all, for their property is not capable of yielding a clear rent over and above the necessary outgoings: *Mersey Docks* v. *Cameron* (3); but they consent to be rated at 40*l.* None of the authorities are inconsistent with the argument for the board.

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(1) Law Rep. 5 Q. B. 489.

McIntyre, Q.C. (*F. Marshall* with him), for the overseers of Llaneilian. The rate as made ought to stand. The counsel for the Mersey Docks and Harbour Board have not now insisted upon the point urged before the Queen's Bench Division that by reason of s. 430 of the Merchant Shipping Act, 1854, the lighthouse is exempt from being rated. The existence of the lighthouse is an inducement to vessels to go to Liverpool, inasmuch as the navigation to that port is thereby rendered safe, and hence the board make a profit from the lighthouse by getting dues paid to them at Liverpool. *Metropolitan Board of Works* v. *West Ham* (1) is distinguishable from the present case: a sewer is incapable of profitable occupation by any person.

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(1) 51 L. J. (Q.B.) 458.

(2) Law Rep. 6 Q. B. 193.

(3) 11 H. L. C. 443, at p. 501, per Lord Westbury, L.C.

[LINDLEY, L.J. I cannot discover a finding in the special case that the tower is capable of beneficial occupation as a telegraph station.]

It is implied in par. 21.

BRETT, M.R. I cannot say that I think that this case is very clearly stated as to the facts; or that the questions which are proposed to the Court are put in very clear terms; but it seems to me that we must consider that there are in truth two kinds of buildings or two kinds of occupations at Point Lynas: one kind of building which is occupied is the tower, and the other kind of buildings which also are occupied are the houses close to it.

With regard to the tower, it is used for the purpose of shewing lights from it, and it is used for the purpose of working a telegraph from it. As far as I can see, the truth is that that tower would be of no use for any other purpose. But dwelling-houses have been built close to it, and they are at present occupied by the servants who are put there by the Mersey Docks and Harbour Board for the purpose of working the light, and for the purpose probably of working the telegraph. Now, the tower and those houses are the property of the Mersey Docks and Harbour Board. The use of the lighthouse by the Mersey Docks and Harbour Board is certainly regulated by the Acts of Parliament. Acts of Parliament, therefore, deal with the purposes for which that lighthouse or that tower is used. Acts of Parliament deal both with the lights and with the telegraph. I think that those Acts of Parliament have treated both those things as maintained out of what has been called in the Acts of Parliament "conservancy receipts." What is the meaning of "conservancy"? The meaning of it is that it relates to the safety of the shipping coming into the port of Liverpool, that is, to the conservation or preservation—"conservation" seems to me to be there used almost as if it were "preservation"—of the ships coming into the port of Liverpool. Both the lights and the telegraph are in those

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(1) Law Rep. 6 Q. B. 193.

Acts of Parliament treated as conservancy apparatus. That conservancy apparatus causes to the Mersey Docks and Harbour Board, by the Acts of Parliament, expenditure, and, I think, gives them the right to receipts; but it seems to me by the construction of those Acts of Parliament, both in respect of the light and the telegraph, the receipts must never exceed the expenditure. When I come to the hypothetical tenant, therefore, who may be supposed to rent this tower, I must take it that he is to rent it subject to the Acts of Parliament, because if he is to rent it not subject to the Acts of Parliament, then he will have no power to levy dues upon shipping that are mere passers-by. Therefore he must take it subject to the Acts of Parliament. Then he must take it subject to the burden, which is, that he can never charge to the ships which pass, and in respect of which therefore the light is of use, and in respect of which the information given by the telegraph is of use, more than is sufficient to pay the expenses to which he is put. If so, it is a profitless occupation, that is to say, by the Acts of Parliament no person who receives the earnings can get any profitable earnings. If so, it has no beneficial value. Therefore in respect of the tower, which can be used only as a lighthouse and telegraph station, it being subject, both as a lighthouse and telegraph station, to the Acts of Parliament, and to the burden put by the Acts of Parliament, it seems to me that the burden being equal to the benefit, there is no beneficial occupation. That occupation is, and I venture to repeat the phrase which we used a short time ago (1), "struck with sterility" by the Acts of Parliament. Therefore nothing can be taken into account in respect of the tower as used as a lighthouse or as used as a telegraph station, and I do not see that there is any finding which says that it could have any beneficial occupation as used for any other purpose. There is a finding that it cannot be. That settles that point at once.

Now I come to the houses. It is clear to me that there can be a beneficial occupation of the houses. They are dwelling-houses. If the Mersey Docks and Harbour Board were inclined to let them to a tenant, there is nothing in the Acts of Parliament which prevents the board from letting them to a tenant. Therefore, there is a beneficial occupation; they are capable of a beneficial occupation; they are dwelling-houses, they can be let, and a tenant will give something for them. Then arises thereupon the question, what is to be the measure of the rateable value. Now if anybody has ever suggested that in order to get at the rateable value of those houses, he has a right to take into account all the earnings of the Liverpool Docks, it is sufficient for me to say that it is contrary to every case that has ever been decided. It seems to me that if any one has ever suggested that, he must have been shutting his eyes and ears, and his knowledge and his understanding to every part of the rating administration of the Poor Law, that has been going on in this country for the last one hundred years. We are to take them, therefore, as buildings at Point Lynas capable of being let as dwelling-houses in a particular position with regard to something else. Are they mere common dwelling-houses, which are to be treated as dwelling-houses without reference to their neighbourhood, or are we to take into account their neighbourhood? Why, whenever we are trying to ascertain the annual value of dwelling-houses, that is, what they would let for to a reasonable tenant, we must take into account the neighbourhood. No tenant would give the same rent, I suppose, for a house in St. Giles's, as he would for a house in a more pleasant part of London. We must take into account the neighbourhood. But what does the neighbourhood consist of? It not only consists of the particular position, but of the other buildings which are in the close neighbourhood of the one which we are valuing, and which may have an effect upon its letting value. Then we take into account the character of those neighbouring buildings. It is perfectly obvious that dwelling-houses which are built as cottages useful for workmen, let at a greater value if a large factory is close to them, which must employ one hundred workmen, all of whom will want houses. Suppose that such a factory is close to them: will they let for more as long as that factory exists, and will they let for less if that factory be burnt down or destroyed or shut up? Of course they will. Therefore, we have to take into account the existence of that factory, because it obviously has an effect upon

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(1) See *West Bromwich School Board* v. *Overseers of West Bromwich*, 13 Q. B. D. 929, at pp. 943, 944, 945.

Brett, M.R.

the letting value of the houses in its neighbourhood as dwelling-houses.

At Point Lynas is the lighthouse, which is also used as a telegraph station. That is a tower, which is in existence and is used by the Mersey Docks and Harbour Board for the purpose of the Port of Liverpool. Well, it is obvious that as long as that state of things lasts, there must be servants to work the lighthouse in the tower and to work the telegraph system which is worked in the tower. Where are those workmen likely to live? It is not stated that they live in the tower; on the contrary, at present it is obvious that the Mersey Docks and Harbour Board consider that their workpeople cannot live in the tower. They might go to Liverpool, but that would be very inconvenient. The probability is, that where houses are positively built for the purpose, the workpeople who work in that tower will use those dwelling-houses. If that is so, what would a tenant, who would be inclined to take those houses and pay a rent for them, take into consideration? Would he or would he not take into consideration that if he should give a rent for these houses, he would have this advantage over the Mersey Docks and Harbour Board that they will inevitably want those houses for the use of their workmen, and then he could get a rent from them. Of course he would; it cannot be doubted that he would. If so, the existence of that tower being used as a lighthouse and as a telegraph station for the Liverpool Docks is a matter, which the tenant who was about to give a rent for these houses would take into his consideration, and in respect of which he would give a higher rent for these dwelling-houses as dwelling-houses, because he could let them again for a still higher rent. Therefore the neighbourhood of the tower must be taken into consideration. Now to that extent, and to that extent only, must it be taken into consideration. But it seems to me that the third question which is put to us involves that proposition. May we take it into account to that extent? The answer is yes, we may. Then it is agreed that if we may, the rateable value of those cottages or houses is to be 76*l.* Whether that figure is a good figure or not, is not for us to say; whether too much value has not been given to the consideration of the lighthouse being there, is not for us to say. It is only the principle which we have to decide, and it seems to me that that is the right principle. It seems to me that that question must have meant to put that case to us, because, as may be pointed out, if it did not mean to put that case to us what is the difference between the third question and the fourth? The fourth question seems to me to involve this, are we bound, in estimating the annual value of these cottages or houses, to strike out the fact from our consideration altogether that a tower is there which is used for a lighthouse and telegraph purposes, and in respect of which servants therefore must be employed who must live somewhere? That is the fourth question. The answer to that is, no, we are not bound to strike that out. The answer to the third question is, that we have a right to take into consideration the fact of the tower being there.

Therefore, it seems to me that the true answer to this case is, that the tower is not to be rated, there is to be no rate in respect of the tower because in respect of the tower there is no beneficial occupation. There is to be a rate in respect of those cottages or dwelling-houses, whatever it may be proper to call them, and upon this case that rateable value is to be 76*l.*

Cotton, L.J. There are in substance two divisions of the questions raised in this case. I say two, because the first and second alternatives are, as I agree with the Master of the Rolls, really one. They both relate to the tower, and they relate to the tower the one as used as a lighthouse and telegraph station, and the other as used simply as a telegraph station. Now, in my opinion, the telegraph and the lighthouse stand on the same footing. They both come within the conservancy receipts and expenditure. It is found in the case (par. 21) that, "The tower of the lighthouse has no occupation value except as a lighthouse and as a telegraph station." Now ought the lighthouse and telegraph station to be rated as highly as proposed in the first alternative? I think not, for this reason: the conservancy receipts and expenses are regulated by Act of Parliament, and the only matter which makes the tower in any way capable of beneficial occupation is, if there be anything in it, the lighthouse itself and the telegraph. Now the receipts in respect of that are restricted by the Acts of Parliament in this way, that they cannot be fixed so as to produce a beneficial result to the harbour board. It may be said that the expenses of maintaining the lighthouse and the telegraph station do not equal the receipts from them. That is very true, but if any tenant took this lighthouse with power of levying dues which he must do under the Act of Parliament, he must take it in a corresponding manner, and if there was any surplus after paying the expenses of this particular portion of the conservancy duty, of course he could not retain that surplus; it must go over towards the conservancy fund to be applied to other conservancy objects. So that even although the receipts in respect of the dues and the receipts in respect of the telegraph would themselves provide a surplus, still the tenant who took the lighthouse would take it with this obligation—that he could not keep the profit because it must go into the conservancy fund.

In my opinion, therefore, there is no rating of the tower in respect of its lighthouse and the telegraph, and it is found that it has no other occupation value.

Therefore, in my opinion, the first and second alternatives are to be answered in favour of the appellants. In the court below the second alternative, I think, was answered in favour of the respondents. Undoubtedly there was a slip in drawing up the order of the Queen's Bench Division.

Now, on the second point, as regards the dwelling-houses—for the alternatives three and four refer to the dwelling-houses—I must say the difficulty to my mind is in understanding what the alternatives mean. But I think it is conceded on both sides that alternative four means that we are to consider that the lighthouse tower is gone altogether, and that it is not in any way to be taken into account. If the fact of the existence of the tower as a lighthouse and telegraph station is to be taken into account, then 76*l.* is the rateable value. Now I am of opinion that the third alternative, the first of those two which I have mentioned, is right. The tower is not to be rated in respect of its use as a lighthouse and as a telegraph station, but as a matter of fact it is used as a lighthouse and telegraph station, and for the purpose of its use servants must of necessity be there, and the fact that there exists this tower used in this way, must of necessity, to my mind, increase and be taken into account in settling what is the net annual rental which probably would be obtained for these houses. It is true that they are to be deemed to be let to a tenant entirely unfettered, but still any one who took those houses would be influenced in the rent which he would give by the fact, that this adjoining tower is used for this purpose and employs for that purpose persons who want to live somewhere; not of necessity that they would go there, but that there would be a greater probability of those dwelling-houses being occupied at a beneficial rent from the fact, that there was this tower hard by in which workmen were employed. Whether the amount is right or not, we have nothing to do with, but, in my opinion, we cannot cast out of consideration the fact of the existence of this tower, although the board are not to be rated in respect of it. In my opinion, therefore, in that sense the third alternative is the correct one.

Lindley, L.J. I am of the same opinion, and for the same reasons, and therefore I shall not repeat them.

I shall only make this observation, that Mathew, J., appears in his judgment to have seen his way to drawing a distinction between this tower as a lighthouse and the tower as a telegraph station, and he has said that "the lighthouse is also used as a telegraph station, and for that purpose it seems to have been found as a fact that it is capable of beneficial occupation." Now I cannot find that as a fact stated anywhere in the case. I can find no ground in the case for drawing any distinction at all between the lighthouse and the telegraph station. It appears to me to be some misapprehension as to the statements in the case. Par. 21 appears to me to shew that there has been some oversight.

Judgment for the appellants. (1)

Solicitors for appellants: *Venn & Co., for A. T. Squarey, Liverpool.*

Solicitors for respondents: *Ravenscroft, Hills, & Woodward, for W. Fanning, Amlwch.*

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(1) The Court of Appeal ordered "that the judgment or order of the Queen's Bench Division of the High Court of Justice of the 30th day of May last herein be set aside, and that judgment be entered for the appellants that a certain rate or assessment made for the relief of the poor of the parish of Llaneilian on the 19th day of May, 1882, be amended by limiting it to premises other than the tower at a nett rateable value of 76*l.*"

J. E. H.

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Nov. 18.

[IN THE COURT OF APPEAL.]

FEARON *v.* THE EARL OF AYLESFORD.

Husband and Wife—Separation Deed—Absolute Covenant to pay Annuity—Adultery by Wife—Condition Precedent—Independent Covenants—Covenant against Molestation—Molestation, what amounts to.

In a separation deed a covenant, by which the husband undertakes to pay his wife an annuity without restricting his liability to such time as she shall be chaste, is good and is not against public policy, and the covenant remains in force and the annuity continues payable, although the wife afterwards commits adultery.

But, *semble*, per Cotton, L.J., on the authority of *Evans* v. *Carrington* (2 De G. F. & J. 481), that if the covenant had been inserted in the separation deed with the intent that the wife might be at liberty to commit adultery, the deed would have been void.

Covenants in a separation deed, by which respectively the husband has covenanted to pay an annuity to a trustee for the wife, and the trustee has covenanted that the wife shall not molest the husband, must be construed as independent covenants in the absence of any express terms making them dependent, and therefore a breach of the covenant, that a wife shall not molest the husband, is not an answer to an action for the annuity.

Neither adultery alone by the wife, nor adultery by her followed by the birth of a spurious child, is a breach of a covenant in a separation deed against molestation by the wife.

But, *semble*, adultery by the wife followed by the birth of a spurious child whom she puts forward as the child of her husband, especially if this is done with intent to claim a title or property to which the legitimate offspring of her husband would be entitled, is evidence of a breach of a covenant against molestation by her.

By Brett, M.R., in order to constitute a breach of a covenant in a separation deed against molestation by a wife, some act must be done by her or by her authority with intent to annoy her husband and which is in fact an annoyance to him, or at least some act must be done by her or by her authority with a knowledge that it must of itself without more annoy her husband or annoy a husband with reasonable and proper feeling.

Appeal by the defendant and cross-appeal by the plaintiff against a judgment of the Queen's Bench Division. (1)

The facts of the case are fully stated in the report of the proceedings before the Queen's Bench Division (1), and here it is necessary only to make the following short statement of them.

The action was brought by the plaintiff, as trustee for the

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(1) 12 Q. B. D. 539.

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defendant's wife, under a separation deed, dated the 22nd of May, 1877, and made between the defendant, his wife, and a trustee for such wife, for 475*l.*, arrears of an annuity, which the defendant had covenanted in absolute and unconditional terms to pay to the trustee in trust for the wife. The statement of defence and counter-claim alleged by way of defence that the separation deed contained a covenant by the wife's trustee that the wife should not molest the defendant at any time after the making of the deed, and that after the making of the deed and before the breaches of covenant sued for, the wife did molest the defendant; and also counter-claimed damages in respect of such molestation. At the trial before Day, J., the separation deed above mentioned was proved, and the non-payment of the annuity was not denied; but for the defendant it was alleged that there had been a breach of the covenant against molestation on the part of the wife. It was proved that after the execution of the deed the Countess of Aylesford had been living in adultery, and had given birth to a male child of whom the defendant was not the father. The defendant had no male issue at the time of the separation. Evidence was also given to shew that the lady's-maid to the Countess of Aylesford had, in the absence of her mistress, stated that the Countess had directed her and other servants to address the child as Lord Guernsey, which would be the title by courtesy of the son and heir of the defendant; but the lady's-maid, who herself was called as a witness, denied that the child was ever addressed by that name. The Countess of Aylesford was not called as a witness. Evidence was given that the plaintiff himself had said that the child was Lord Guernsey, and that the plaintiff would so describe the child in any deed which he should have to draw. The Countess of Aylesford had accepted a large annuity from the father of her illegitimate child. It further appeared that the defendant had attempted to obtain a divorce from his wife, but the suit failed owing to some allegations made against him. The jury found that there had been a breach of the covenant against molestation, and assessed the damages on the counter-claim at 100*l.* Day, J., held that the molestation was an answer to the plaintiff's claim, the covenants to pay the annuity and against molestation being dependent covenants; he therefore gave judgment for the defendant on the claim and counter-claim. In a Divisional Court of the Queen's Bench Division (1) this judgment was varied, and judgment was entered for the plaintiff for the amount of the arrears, and for the defendant for 100*l.* on the counter-claim.

Nov. 17, 18. *Waddy, Q.C.*, and *Francis Turner* (*E. F. Studd*, with them), for the defendant. In this case the defendant is under great difficulties in establishing his case, for it has been almost impossible to prove what his wife's conduct as to the illegitimate child called "Lord Guernsey" has been; and therefore a less amount of evidence ought to be satisfactory than in an ordinary case. But even upon the facts as they stand, the defendant as the husband is relieved from liability under the deed of separation by his wife's unchaste conduct, although no dum casta clause was inserted: he is bound to pay the annuity only so long as she is chaste: that term is implied in the covenant to pay; and to hold otherwise would be contrary to public policy and even decency, for it must be assumed to have been contemplated that the wife should live chastely. It may be that the dum casta clause is not a "usual covenant" in a separation deed: *Hart* v. *Hart* (2); but in that case the decision is perhaps inconsistent with other authorities, and at all events is not binding upon this Court. The deed of separation is not to be considered as a letter of licence to the Countess of Aylesford to commit adultery: *Sullivan* v. *Sullivan* (3); and the dum casta clause is to be implied and is to be read into the deed as one of its provisions.

[BRETT, M.R. If the dum casta clause is to be read into the deed as one of its clauses, upon one act of unchastity by the wife the right to the payment of the annuity will be gone for ever.]

If any part of the consideration of a deed is immoral, even although the immorality does not appear on the face of it, the deed is void or at least not enforceable: *Willyams* v. *Bullmore*. (4)

[LINDLEY, L.J. That was a case of the sale of a daughter's chastity.

COTTON, L.J. This is not a case of immoral consideration;

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(1) 12 Q. B. D. 539.

(2) 18 Ch. D. 670.

(3) 2 Addams, 299, at p. 303.

(4) 33 L. J. (Ch.) 461.

and the deed is good, unless it is against public policy that a deed of separation should be drawn without inserting the dum casta clause.

BRETT, M.R. There is no evidence that at the time of the execution of the deed the Countess of Aylesford intended to commit adultery, and that the deed was executed in furtherance of that purpose.

COTTON, L.J. In that case the deed of separation might have been invalid: *Evans* v. *Carrington*. (1)]

A husband, when he separates from his wife, must be assumed to contemplate that she will live chastely; because if she is unchaste and has a bastard child, he will be primâ facie held to be the father of an offspring that is really spurious. A deed of separation is merely an arrangement for living apart, and when a state of things arises which was not in contemplation when the deed was executed, it is no longer binding: *Morrall* v. *Morrall*. (2)

[COTTON, L.J. It seems to have been assumed by the Court of Appeal in *Gandy* v. *Gandy* (3) that a deed of separation will hold good, notwithstanding the parties to it may commit adultery.]

No doubt *Gandy* v. *Gandy* (3) is the strongest case against the defendant. He does not give up the point that adultery alone by the wife is an answer to an action on the deed; but it must be admitted that some of the cases are against this contention. In the early case of *Scholey* v. *Goodman* (4) it seems to have been assumed that adultery by the wife would be an answer to an action to recover money payable under an agreement for separation.

[BRETT, M.R. That case is simply a decision as to the old law of pleading: it is not an authority upon any other question.]

It must be admitted that in *Jee* v. *Thurlow* (5) it was taken by the Court of King's Bench to be clear law that adultery by a wife is not an answer to an action for an annuity payable under a separation deed; it is a strong case against the defendant, but it may be overruled in this Court, if it is contrary to the decisions in Equity.

[COTTON, L.J. According to the view of Grant, M.R., in

(1) 2 De G. F. & J. 481.
(2) 6 P. D. 98.
(3) 7 P. D. 77, 168.
(4) 8 B. Moore, 350; 1 Bing. 349.
(5) 2 B. & C. 547.

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Seagrave v. *Seagrave* (1) the rule in Equity as to separation deeds was the same as at Common Law.

LINDLEY, L.J. *Jee* v. *Thurlow* (2) appears to have been followed without any hesitation in *Baynon* v. *Batley.* (3)]

For the defendant it is not denied that the liability to pay the annuity would have continued to exist notwithstanding any act of his, provided the Countess of Aylesford had led a chaste life: *Goslin* v. *Clark.* (4)

Further, the Countess of Aylesford "molested" the defendant contrary to the covenant contained in the separation deed. It may be that "molest" means "personally molest": *Thomas* v. *Everard* (5); but the evidence given at the trial shewed that there had been personal molestation. In *Charlesworth* v. *Holt* (6), and *Grant* v. *Budd* (7), the question of molestation does not appear to have been raised. The molestation may be of different kinds; adultery and the birth of an illegitimate child as a consequence of that adultery are sufficient evidence of molestation; so also is open and notorious adultery; and, further, adultery accompanied by the birth of a spurious child and by the holding out of that spurious child as legitimate, is sufficient evidence of molestation. Surely profligacy in a wife amounting almost to open prostitution is molestation within the meaning of the covenant, although there may be no personal or bodily interference with the husband. There was evidence that the lady's-maid to the Countess of Aylesford had stated that she and other servants had been directed by the Countess to address the spurious child as "Lord Guernsey," which would be the courtesy title of the eldest legitimate son of the defendant.

[BRETT, M.R. That evidence was mere hearsay, the statement of the lady's-maid not having been uttered in the presence of the Countess of Aylesford.]

It is not unreasonable to suppose that the spurious child was called Lord Guernsey in the Countess of Aylesford's house with her consent. The question, whether the covenants are dependent or independent, must no doubt be decided upon the words and the construction of the deed; but it is clear that they are dependent, for it would be most unreasonable that a husband should be compelled to contribute to his wife's support, if she continued to annoy him. A mere threat to do something of an annoying nature may amount to a breach of a covenant against molestation in a separation deed: *Sanders* v. *Rodway.* (1) Any act which annoys or injures another, "molests" him: *Reg.* v. *Duffield.* (2) Adultery is molestation, because the injured husband must be annoyed; and a wife who commits adultery must be taken to have contemplated the consequence of her act; she must be taken to have intended to annoy her husband.

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(1) 13 Ves. 439.

(2) 2 B. & C. 547.

(3) 8 Bing. 256.

(4) 12 C. B. (N.S.) 681; 31 L. J. (C.P.) 330.

(5) 6 H. & N. 448.

(6) Law Rep. 9 Ex. 38.

(7) 30 L. T. (N.S.) 319.

[BRETT, M.R. A woman commits adultery in order to gratify her own unlawful passion; she does not think about the annoyance to her husband when she abandons herself to her lover.]

The gratification of her unlawful passion does not exclude the intention to annoy her husband. The Countess of Aylesford was receiving the wages of prostitution from her paramour, who had settled an income upon her.

Finlay, Q.C., and *R. O. B. Lane,* were not called upon to argue for the plaintiff.

BRETT, M.R. In this case I have carefully read the judgments of the judges in the Divisional Court, and I agree with part of those judgments and differ from part.

The action is brought by the trustee of Lady Aylesford in order to enforce the payment of an annuity which was granted by a separation deed executed by her husband, it being an admitted fact that the payments were in arrear. In answer to that it was pleaded that there was a defence, or that there were defences, which relieved the husband from any liability upon the claim. One of those defences was that the wife had, after the separation deed was executed, committed adultery, and that that adultery caused the deed thenceforth to be inoperative. Another defence was that the plaintiff had covenanted in the separation deed that the Countess should not molest her husband, and it was urged by way of defence that she had molested her husband

(1) 22 L. J. (Ch.) 230. (2) 5 Cox, C. C. 404.

within the meaning of that clause, and that the payment of the annuity was dependent on her observing that covenant, that is to say, that as between those two covenants the one was the condition upon which the other was to remain valid, and therefore, that the condition having been broken, there was a defence to this action.

There was a counter-claim on the part of the defendant, the husband, to this effect: that though he should have at law no defence against the claim, yet he had a right to counter-claim, for his wife had broken the covenant not to molest him, and therefore he was entitled to damages. That was the view which the judgment of the Court below upholds. That judgment of the Court was this, that there was no defence to the statement of claim, and that therefore, on the statement of claim, the trustee of the wife was entitled to recover the arrears of the annuity, but that on the counter-claim there was evidence to go to the jury, on which the jury had not improperly found that the wife had molested the husband, and that therefore the husband was entitled to damages, and the jury on that view gave the husband damages to the extent of 100*l*. We have to say whether we agree in that judgment.

The deed before us is a separation deed. Differences had arisen between the husband and the wife, and it is of no use to disguise what those differences were. The wife had been accused by the husband, and, as far as we can see, rightly accused, of having been guilty of the grievous offence of breaking her marriage vows, and of having committed adultery. For reasons into which it is not necessary to enter, he did not go the length of obtaining a divorce, although he went the length of at first persisting in trying to obtain one. That fell through—I inquire not why—it signifies not. That fell through, and instead of persisting in obtaining a divorce or in obtaining a judicial separation, a separation was come to by agreement, and that separation by agreement was carried out by this deed. Now in the deed there is an absolute covenant by the husband in plain and simple words to pay the wife a certain sum of money (500*l*. a year), by half-yearly payments, as long as he and she shall live. That is admitted to be one simple, plain, and absolute covenant. Then there is a covenant on the part of the trustee for the wife, which is equivalent to a covenant by the wife herself, that she will not molest her husband.

The first point taken is this: that even although that covenant to molest were not in the deed, yet the fundamental condition of a separation deed is, that the wife must remain chaste after the separation, and that if she commits adultery that, ipso facto, prevents her from ever suing on the deed or insisting upon the payment of the annuity; and it has been urged that the Court must so hold, on the ground that it is against public policy that a separation deed should be allowed to stand otherwise than on the footing, that, if the wife commits adultery, the deed from that time becomes invalid. Now I entirely agree that when a covenant is made between two persons in plain terms, from which the only inference to be drawn is that they intended what they have said, it is a most dangerous doctrine to introduce into that covenant, unless one is forced to do it by almost inevitable necessity, another covenant which, everybody must know, the parties did not intend to introduce, on the ground that, unless it be introduced, the contract between the parties is against public policy. If this point were now for the first time to be decided, I myself should absolutely refuse to say that owing to the mere fact of a woman falling into this grave offence under any circumstances of neglect by her husband, or after any effluxion of time, public policy requires that—whatever may have been the temptation under which the woman has succumbed—the husband shall not be obliged to pay to her the annuity, which he has undertaken to pay to her without any such condition being expressed. But there is more than that. It seems to me that that point has been decided in England for many years, for if ever there was such a doctrine in our law, it must have existed during the whole of that time; and yet it has been again and again overlooked. If that argument be true, the clause, which is often put into such deeds by the most expert conveyancers, was an absolutely futile and senseless clause, namely, the clause that the annuity shall be paid only while the wife remains chaste. Therefore authority and principle seem to me to shew that there is no such doctrine as that as to public policy, which has been vouched in order to take away the effect of this deed. Then it has been urged that, where there is a covenant in the deed that the wife shall not molest the husband, this is not only a covenant, but a condition on the happening of which the other covenant to pay the annuity becomes ineffective. The doctrine, on which the Courts have decided whether covenants or clauses in deeds or agreements which in their form are separate and distinct, are nevertheless to be treated as reciprocal, and the one as being a condition of the other, has been often enunciated, and the rules have been laid down. Does this case, where the two covenants are independent in form, come within those rules? Again, if it was to be decided for the first time, it would be found that it does not come within the rules; but it is not to be decided now on such a footing, for again, for many years such deeds as this have been, unhappily, known in England, and it has been held again and again, both in the courts of law and in the courts of equity, that these covenants are not so far reciprocal that the observance of the one is a condition subsequent on the breach of which the other fails. I feel that I should have decided in the same way. Even if I should not have decided the point in the same way, if this had been merely a case of the first complexion, nevertheless I must have decided it, as I do, on a rule of conduct which has been adopted many times, namely, that I must come to the conclusion that this deed has been drawn on the faith of the cases, which have been known to the skilled persons who draw deeds of this kind. Even although I were to think that the cases were wrong at the time they were decided, I cannot overrule them now for the purpose of getting rid of a deed which has been drawn upon the faith of them. It follows that deeds drawn on the faith of those decisions are drawn with the intent and meaning that those decisions will be followed, and therefore that these covenants are not reciprocal, and the covenant, that the Countess will not molest, is not a condition subsequent, which will take away the effect of the independent covenant to pay the annuity. Therefore, even although there had been molestation by the wife, that would not relieve the defendant from being liable on the claim.

The rest of the argument only goes to the question of the counter-claim. It has been urged that the Countess has broken the covenant not to molest, and that her trustee is liable in damages. It is true that if she has broken the covenant not to molest, he is liable in damages, because he has undertaken with the defendant that she shall not break that covenant. It is said that she has broken the covenant upon two views. It has been strongly urged, as might have been expected, that she broke the covenant, even although it is not proved that she held out the child which is not the son of Lord Aylesford, as the son of Lord Aylesford. It is contended that the wife has molested her husband, because she has committed adultery, and further because she has committed adultery and she has had a child as the result of that adultery. That is one view of the case. It is said to be adultery with an aggravation, and it is contended that adultery with an aggravation is molestation. Then it is said that not only has she committed adultery, but she has committed it under circumstances of public notoriety, and that that would be molestation. If the adultery alone is not molestation, I fail to see how the fact of having a child which is the result of that adultery can be said to be a molestation by her. My Brother Denman, I observe from his judgment, went at some length into that matter, and I think it obvious, without going at any length into it, that if the fact of adultery is not sufficient, the result, which sometimes happens as the consequence of adultery, is not sufficient, namely, the birth of a spurious child. He says that the birth of the child was no act done by the lady (1): I perfectly agree with him in that. Now in order to determine this point of molestation, I think that I am bound to consider what would be molestation, or what would entitle a jury to say that within the meaning of such a covenant as this in a separation deed there had been molestation by the wife. Now first of all it seems to me that it must be an act done either by the wife herself or by some agent authorized by her to do it. No act done by any one else can be a breach of the covenant that she will not molest. What kind of act must be done in order to constitute a molestation? I am of opinion that the act done by the wife or by her authority must be an act which is done with intent to annoy, and does in fact annoy; or which is in fact an annoyance; or, to put the latter proposition into another shape, that it must be an act done by her with a knowledge that what she is so doing must of itself without more annoy her husband, or annoy a husband with ordinary and reasonable feeling. I am not sure, but I am inclined to think that what I have put as an alternative proposition is really included in the first, because if a wife does an act with a knowledge that what she is doing must of itself without more annoy her husband, if he is a person of proper and ordinary feeling as a husband, it seems to me that the natural and proper conclusion to be drawn as a matter of inference from the evidence would be that she did intend to annoy; but whichever may be the more correct form of stating the proposition, one or the other of those propositions must be fulfilled. Does the fact of committing adultery come within either? Can it be said that the mere fact of a woman committing adultery is evidence of an intention to annoy her husband? It must be considered whether it is a true proposition to say that the mere fact of a woman committing adultery at any time, at any interval of time, at any distance from the place where the husband may be, under any circumstances whatever, of itself would shew that she is then intending to annoy her husband. It is contrary to the truth. That is my answer to the argument. No man, who will think carefully, can come to the opinion that a woman, when she is committing adultery, misconducts herself with the intent of annoying her husband. She does it from other motives. It may be from mere wickedness, or she may do it under grievous temptation, in which case, although it is very wrong, the woman is as much to be pitied as condemned. To say that a woman commits adultery in order to or with intent to annoy her husband, is absolutely untrue. The contrary is the truth, and there is no doubt that in almost all cases when she gives way in that manner, it is not for the purpose of annoying her husband, but it is for the purpose of gratifying the man for whom she has come to entertain either a temporary or a permanent affection. Then can adultery come within the principle, that the wife is doing an act with a knowledge that what she is doing must of itself without more annoy her husband? Certainly not. The utmost that can be said, is that she must know that if it comes to the knowledge

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(1) See 12 Q. B. D. 547.

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of her husband it will annoy him; but that is to introduce another circumstance which does not come within the proposition, that circumstance being that her adultery shall be brought to his knowledge; and therefore the mere fact of the adultery does not come within either proposition, and something else must be relied upon to constitute molestation. If that is not within either proposition, the mere fact of having a child afterwards is not. Then it has been urged that, however great her distance may be from her husband, if she commits adultery publicly so that people know that she is doing it, that must molest him. But again the molestation will depend upon whether the people who know it, will go and tell her husband. Another and a particular circumstance must be introduced, for which the wife is not responsible, and which does not necessarily follow, and therefore in no view can it be molestation.

Then I come to this, that if a woman under such circumstances having a child which she knows is not her husband's (and, of course, she knows that), does openly produce that child and does acts which would intimate that she is putting it forward to the world as the child of her husband, from that conduct alone there might be evidence, and possibly strong evidence, of an intent to annoy; but if she shews that she means to found some legal claim either to his title or to his property in respect of that spurious child, I confess I have not a doubt that in either of those cases there would be strong evidence of an intent to annoy, and that when that is proved, the jury would be quite justified in saying there was a molestation in contravention of the covenant which I am considering. If, therefore, there had been evidence that this child was put forward by Lady Aylesford to the world as being "Lord Guernsey," from which the inevitable deduction would be that she was flaunting it in the face of the world as the child of her husband when she knew that it was not, I say that without more that would be evidence upon which a jury would be justified in finding molestation. But the question is whether there was evidence to go to the jury, that the putting forward was done with her knowledge. Now the effect of the evidence, when it is properly left to the jury, is for the jury alone; but the question whether there is any evidence to go to the jury is a question of law, and we have to see whether there was in point of law sufficient evidence to go to the jury that this child was called Lord Guernsey by the authority or with the consent of Lady Aylesford. It was suggested that there were great difficulties in the way of the defendant, and that therefore a less amount of evidence was wanted to allow him to lay the case as to molestation before the jury. I repudiate any such view; every case has to be tried according to the rules of evidence, and this case is not to be treated in a different way from any other, and the question is whether there was any evidence to go to the jury, that this child was called Lord Guernsey by the authority or with the consent of Lady Aylesford. There is evidence, although it is very slight, that this child was called Lord Guernsey in the house of its mother. I am inclined to think that every person present at the trial understood that questions asked as to conversations with the lady's-maid were put with a view of shewing Lady Aylesford's authority. But we must act according to the rules of evidence. Is it evidence that Lady Aylesford authorized the lady's-maid to call the child Lord Guernsey, that the lady's-maid said to a witness at the trial that Lady Aylesford had told her to do so? It requires really the stress of such a case as this even to excuse or to authorize counsel to contend that what a lady's-maid has said about what her mistress has said, is evidence of what the lady herself has said. It is impossible to hold that that is evidence that Lady Aylesford had authorized it.

Then it was said that the plaintiff himself had stated that he would call the child Lord Guernsey, and that if he ever drew a deed in which his name occurred, he would put it in and he would defy the solicitor on the other side to shew that the child was not Lord Guernsey. How can that be evidence that the mother has authorized people to call the child by the name of Lord Guernsey? The proposition only requires to be stated to shew how futile it is, and under what stress it must have been brought forward. It seems clear beyond all doubt that there was no legitimate evidence to be left to the jury that the child was called Lord Guernsey by the direction or with the authority of its mother—Lady Aylesford. There may have been, as has been stated, great difficulties in the way of the defendant getting evidence. Those difficulties must, however, be overcome in order to make evidence. His counsel declined to take the last and only possible means by which he might have got some evidence: I mean, they declined to take the last legitimate means of calling Lady Aylesford herself. In taking that course, I think that they were right. It is obvious to any of us who are acquainted with legal proceedings, that Lady Aylesford would most probably have denied it, and then their case would have been gone. They took their chance of going to the jury on the other evidence without calling Lady Aylesford. The lady's-maid, who was in fact called, instead of giving evidence that she had been authorized by her mistress to call the child Lord Guernsey, denied it, and therefore I have not a doubt that the only case which would have made a molestation by Lady Aylesford broke down, because there was no evidence which the defendant could procure, that the Countess had herself called the child Lord Guernsey, or that he was so called by her orders. Therefore, on the whole, after having heard this case most elaborately argued, I have come to the conclusion that the plaintiff was entitled to succeed upon the statement of claim, and that there was no evidence to go to the jury in favour of the defendant's counter-claim, and that consequently the decision ought to have been at the trial that the plaintiff was entitled to the verdict and judgment against the defendant on the counter-claim.

Cotton, L.J. I am of the same opinion, and in considering the case I will take the counter-claim first, for this reason, that as, in my opinion, there is no evidence in support of the counter-claim, it is got rid of, and it becomes unnecessary for me to give my judgment upon the point which was urged, namely, that the covenant not to molest is coincident with the covenant to pay the annuity, and that upon the breach of one covenant the other also fails. I do not differ from the Master of the Rolls on that point.

Of course I must consider what "molestation" is. I have satisfied myself that, in order to come within this covenant it must be some act done by the lady herself which annoys Lord Aylesford, but that it is not sufficient merely to shew that she has done an act which annoys Lord Aylesford, and in my opinion the first branch of the definition given by the Master of the Rolls really involves the whole, namely, that in order to hold that there has been molestation within the words of the covenant, there must be an act done by Lady Aylesford with the purpose and intent to annoy and injure, and of course when a person does an act the natural tendency of which is to annoy and injure, *primâ facie* she must be supposed to have that intention. I quite agree to that. I myself have very often expressed the same opinion, when a person does an act the obvious consequence of which is a certain result, that the person must be taken to contemplate that result; but when I find an act done which although it may annoy, injure, or vex, nevertheless is obviously and clearly referable not to the intention to vex, or annoy, or injure, but is done from an entirely different motive, I cannot say in that case that that is molestation. There always is a difficulty in definitions. What I have to see, is whether acts have been done on the part of Lady Aylesford, of which acts evidence was produced at the trial, and which were breaches of this covenant not to molest. I may dispose very shortly of the alleged holding out of this child as the legitimate son of Lord Aylesford, and as Lord Guernsey. I quite agree with the Master of the Rolls on this point, and therefore I think I need only say that if she had so held out the illegitimate child, knowing that this child was not Lord Guernsey, she must be considered as having done that for the purpose of annoying him personally or injuring him as regards his property; but in my opinion there was no evidence to be left to the jury on this question.

The other acts relied upon are the adultery and the birth of the child. In my opinion it would be wrong for us to say that those acts, either the adultery, or the adultery coupled with the birth of the child, can be considered a breach of this covenant not to molest. The adultery is obviously not referable to an intent to annoy the husband. We know not under what circumstances the act was committed, whether by reason of her having an affection for the man with whom she committed the adultery or for the mere purpose of satisfying her own passion; and we shall be going contrary to the view which we must entertain from our knowledge of the world, if we were, especially under the circumstances of this case, to say that the adultery was an act done in order to injure, annoy, or vex her husband. Then can the birth of a child come to more? Obviously this was no fresh act done by her. It must be referred back to the adultery, and if the adultery is not of itself a molestation, I cannot see how that which is the natural result following upon an act of illicit intercourse with the man who commits adultery with her, can in any way be a molestation.

Of course it may be, that if she had publicly communicated the fact that she had been guilty of adultery to her husband, that might be molestation; but there is nothing of that sort here, because she was living under an assumed name in Paris, and there is no suggestion that this was done in such a way as to be communicated to her husband, and in no sense can it be said to have been an annoyance.

I come to what really is a much graver question, because it involves general principle, and it is, that under the circumstances proved at the trial, without reference to the covenant against molestation, the annuity has ceased. There is no provision in this deed in terms for chastity, and although there is a clause to that effect which is not by any means unusual in separation deeds, yet it has not been inserted in this deed. I should say for myself that a provision is generally inserted in separation deeds, that the annuity shall be payable to the wife as long only as she leads a chaste life. But it is said that the living a chaste life on the part of the woman was so far a condition upon which the parties were acting, that it ought to be considered as the foundation of the deed, and when the chastity is at an end, the provision made by the deed goes too, and that this construction must be considered primâ facie as having been the intention of the parties. It is very true that we cannot suppose the parties here to have had in their minds that there would be unchastity on the part of the wife, but they have omitted to make a provision for that which was not in their minds, namely, the fact of her leading an unchaste life. There have been decisions during the last fifty years, (to which I shall have to advert on the other part of the case as to public policy,) that adultery alone on the

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part of the wife is not an answer to her claim to be paid her annuity; and in my opinion this fact shews that the parties cannot be considered as having intended that the provision against unchastity should be implied.

It is said that it is contrary to public policy that this annuity should continue to be paid after the wife has committed adultery. Now that means that, as a matter of law, this deed after that event would be ineffectual so far as the payment to her of this annuity is concerned. Certain cases (which I am not prepared to overrule,) have decided that that is not the law, and those cases for many years have been followed in numerous instances, and in my opinion not only are we bound by them, but the decisions in those cases were right. How was the argument put as a matter of principle? It was said that if the parties contemplated the continuance of the annuity after the adultery of the wife, they were providing for and had in their contemplation the wife's adultery, and on that ground the deed would be void, and then it was urged that if a dum casta clause was not to be implied in the deed, there would be a licence to the woman to commit adultery. If the deed was prepared and so constructed as to enable the woman to commit adultery with impunity, and it was a deed executed with that object, no doubt that deed would be against public policy, but it is erroneous to say that because the parties have not provided in the deed that she shall be chaste and that if she is not she shall lose this annuity, they are providing for adultery or are giving her licence to commit adultery. It only means that they have not said that if she commits adultery, this provision shall come to an end. I am not at all satisfied that public policy would be struck at by continuing an allowance to a wife, who has committed adultery. I am not at all sure that that would be wrong. I will not express an opinion upon it. It is not to my mind an inducement to her to commit adultery. I am at a loss to see how public policy requires that when a woman commits adultery she shall at once be made destitute and be entirely stripped of all those means which her husband provided for her when they separated, so as to prevent her from falling into a state of indigence and want. In my opinion, there is no ground for saying that it is contrary to public policy that this annuity should continue, although the wife has committed adultery. But it has been urged that the adultery is to be considered as a part of the equitable defence (at least so I understood it,) to the claim of the wife. There may be circumstances of such a character as will prevent the guilty wife from insisting upon the deed, and which will enable the husband in a court of equity to set up an equitable defence; but in my opinion the mere adultery does not deprive the guilty wife of the right to come into the High Court and get the assistance of the Court in order to obtain the provision which has been made for her. In my opinion, therefore, the covenant to pay the annuity can be enforced, and there is no ground upon which we ought, on behalf of the husband, the defendant, to interfere and prevent the trustee for the wife from insisting upon the legal rights which she possesses under the deed.

LINDLEY, L.J. I am of the same opinion, and I shall make observations upon two points only.

The first is whether the adultery of the wife is a defence to the action for the annuity. Now that appears to me to be settled, and to be so settled by long authority, both at law and in equity, that it would be wrong for us to disturb that rule, even although we thought it unsound. It has been settled for at least 100 years, as may be seen by tracing the cases back from *Seagrave* v. *Seagrave* (1) and *Jee* v. *Thurlow.* (2) The earliest cases that I need mention are *Sidney* v. *Sidney* (3) decided in 1734, and *Blount* v. *Winter* (4) decided in 1781: in these the matter was discussed, and from the time of these decisions it has not been seriously argued in courts of either law or equity. I am aware that dicta may be found in the Court of Arches (see *Sullivan* v. *Sullivan* (5)) which are not altogether in accordance with the view which has been taken in other cases. But this is a mere action at common law for an annuity due under a deed, and to that action adultery is no answer. That I take to be perfectly settled.

Then the next question which arises, is whether there has

(1) 13 Ves. 439.

(2) 2 B. & C. 547.

(3) 3 P. Wms. 269.

(4) 3 P. Wms. 276, n.

(5) 2 Addams, 299

been any breach by this lady of the covenant not to molest her husband. I do not attempt to define the word "molest." It may not be capable of being easily defined in ordinary language. The word is elastic, and I do not say whether it is possible to "molest" without an intent to molest. I do not say it is; but I wish to guard myself against being supposed to come to any decision upon it. The lady, by her trustee, covenants not to molest her husband. What has she done? It is alleged that because she has allowed some man other than her husband to have intercourse with her, she has molested him. I cannot understand that conduct to be a breach of the covenant; and if once it is admitted that such conduct is not a molestation, no breach of the covenant has been proved to have been committed. Of course some circumstances coupled with adultery may amount to molestation; but I cannot say as a general proposition that the mere fact of adultery even coupled with the birth of a child is a molestation of him. It seems to me that so to hold would be to stretch language, and would be to put a forced construction upon the words which they would not bear in ordinary parlance.

Another point has been taken. It is said that there is evidence to shew that the wife molested her husband by passing off her bastard son as his. That is another matter altogether. I think if that were made out, there would certainly be evidence to go to the jury with regard to molestation by her. But the evidence is of the most shadowy kind, and to my mind there is not a particle of evidence that she did anything of the sort, although there may be some evidence that the present plaintiff called the child Lord Guernsey; but whatever it may have amounted to, it has not been traced to her. There is no evidence that she did so, and I think that question ought not to have been left to the jury.

It appears to me therefore that the plaintiff is entitled to judgment on the claim and on the counter-claim.

Judgment for the plaintiff on the claim and counter-claim.

Solicitor for plaintiff: *J. H. Lee.*

Solicitors for defendant: *Kaye & Guedalla.*

J. E. H.

[IN THE COURT OF APPEAL.]

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March 18.

EDMUNDS *v.* WALLINGFORD.

Indemnity—Goods lawfully seized for another's Debt.

As a general rule, where one person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt the owner is entitled to recover the value of them from the debtor; and the right to indemnity exists although there may be no agreement to indemnify, and although there may be in that sense no privity between the owner of the goods and the debtor.

England v. *Marsden* (Law Rep. 1 C. P. 529) questioned.

The defendant bought the business of an ironmonger in his own name for his two sons; he paid the greater part of the purchase-money. The banking account of the business was kept by him, and he drew the cheques on that account. A society having obtained judgment in an action against the defendant, certain goods of his sons were seized by the sheriff: the sons claimed the goods; but upon an interpleader summons taken out by the sheriff, the claim of the sons was barred, and the goods were sold. They realised 1300*l.*, and this sum was paid into Court in the action by the society against the defendant as a security for what might be found due to the society from the defendant upon taking certain accounts. The defendant's sons were afterwards adjudicated bankrupts, and the plaintiff was appointed their trustee. The defendant agreed with the plaintiff that in consideration of his sons' goods having been seized and sold on behalf of the society in respect of an alleged claim against him, he would pay 300*l.* per annum to the plaintiff until he should have paid a sufficient sum to pay the trade creditors of his sons in full. The plaintiff having brought the present action to recover 1200*l.* due by virtue of the above-mentioned agreement, or in the alternative 1300*l.*, the value of the goods seized:—

Held, that even if the defendant's express promise to pay 1200*l.* was not legally binding upon him, nevertheless the action was maintainable; for although the decision upon the interpleader summons did not estop the defendant from shewing that the seizure by the sheriff was unlawful, nevertheless he had by his conduct led to the seizure, and the goods of his sons had been legally taken for his debt; the defendant, therefore, was bound to indemnify his sons, and the plaintiff, as their trustee in bankruptcy, was entitled to have judgment entered for him for the sum of 1200*l.*, which he was willing to accept instead of 1300*l.*, the value of the goods seized.

ACTION upon an agreement dated the 8th of May, 1879, and in the alternative for money received, and in the alternative for money paid. At the trial before Huddleston, B., without a jury, the learned judge gave judgment for the plaintiff for 1200*l.*, and the defendant appealed.

The facts of the case are stated in the judgment of the Court of Appeal hereinafter set forth, and also may be gathered from the above head-note.

March 13. *A. R. Jelf, Q.C.*, and *Johnston Watson* (*C. Johnston Edwards*, with them), for the plaintiff.

Finlay, Q.C., and *W. Baugh Allen*, for the defendant.

The arguments relating to the questions decided by the Court are sufficiently stated in the judgment; but the following points also were discussed by the counsel of the parties:—

First, whether the agreement of the 8th of May, 1879, was supported by a good consideration: as to this point, *Roscorla* v. *Thomas* (1); *Eastwood* v. *Kenyon* (2); Chitty on Contracts, ch. 1, s. 1, pp. 50, 51 (11th ed.), were cited:—

Secondly, whether an action for money paid at the defendant's request was maintainable: as to this point, *Jefferys* v. *Gurr* (3); *Pownal* v. *Ferrand* (4); *Grissell* v. *Robinson* (5); *Bradshaw* v. *Beard* (6); *Moule* v. *Garrett* (7); *Rodgers* v. *Maw* (8); *Pawle* v. *Gunn* (9), were cited:—

Thirdly, whether the plaintiff, as the trustee in bankruptcy of the defendant's sons, was estopped by the decision upon the interpleader summons from shewing, that the goods seized and sold by the sheriff in the action brought against the defendant by the society were really his sons' and not his: as to this point, the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 17; *Duchess of Kingston's Case* (10), were cited.

But owing to the view taken by the Court as to the principle upon which the case ought to be decided, it is unnecessary to notice at length the arguments on these three points.

Cur. adv. vult.

March 18. The following written judgment of the Court (Lord Coleridge, C.J., Sir James Hannen, and Lindley, L.J.) was delivered by

LINDLEY, L.J. The plaintiff in this action is the trustee in bankruptcy of two sons of the defendant, and the action is brought to recover 1200*l.* promised by the defendant to be paid to the plaintiff, as such trustee, and in the alternative the plaintiff claims 1300*l.*, the sum realised by the sale of goods belonging to the sons, but seized and sold under a judgment recovered against the defendant. The defendant alleges that there was no consideration for his promise to pay the 1200*l.*, and that the goods seized were his own goods and not those of his sons.

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(1) 3 Q. B. 234.

(2) 11 A. & E. 438.

(3) 2 B. & Ad. 833.

(4) 6 B. & C. 439.

(5) 3 Bing. (N.C.) 10.

(6) 12 C. B. (N.S.) 344; 31 L. J. (C.P.) 273.

(7) Law Rep. 7 Ex. 101.

(8) 15 M. & W. 444, at p. 448.

(9) 4 Bing. (N.C.) 448.

(10) 2 Sm. L. C. 784.

In order to understand this controversy, it is necessary to state the circumstances which led to it. They were shortly as follows:—

In April, 1876, the defendant bought the business of an ironmonger in Andover in his own name but for his son William. The greater part of the purchase-money was paid by the defendant. The lease of the place where the business was carried on was taken in his name; his wife lived on the place; he came there every week, and assisted more or less in the business, and the banking account of the business was kept in his name, and he alone drew cheques on that account.

In August, 1876, the defendant's sons, William and Edward, carried on the business as partners under the name of Wallingford Brothers; but the defendant continued to visit the place and to keep the banking account as before, the business cheques being signed by him in the name of the firm.

From March, 1878, to September, 1878, the defendant lived at the place. In the autumn of 1878 an action was brought against the defendant by the Mutual Society, and in October, 1878, judgment was signed against him. On the 24th of October, 1878, the goods on the premises where the business was carried on were seized. The sons claimed them; but upon an interpleader summons taken out by the sheriff the claim was, on the 11th of November, 1878, barred, and the goods seized were accordingly sold. They realised 1300*l.*, and this sum has been paid into Court in the action of *Mutual Society* v. *Wallingford* as a security for what may be found due from the defendant to the society upon taking certain accounts directed to be taken in that action. (1) On the 28th of November, 1878, the sons were adjudicated bankrupt. The plaintiff is their trustee, and on the 8th of May, 1879,

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(1) See *Wallingford* v. *Mutual Society*, 5 App. Cas. 685.

1885

EDMUNDS v. WALLINGFORD.

Lindley, L.J.

the defendant entered into the agreement sued upon in the present action. The agreement is as follows:—

"I, John Wallingford, of 22, Chelsea Road, Southsea, hereby agree with Henry William Edmunds, of 4, Sumner Row, Birmingham, as trustee in the bankruptcy of my sons William John and Edward, that in consideration of their ironmongery stock in and about their shop and premises at High Street, Andover, having been seized and sold on behalf of the Mutual Society of Ludgate Hill, London, in payment of an alleged claim against me, I undertake and agree that in the event of my succeeding in an action I am about to bring against the said Mutual Society, to pay all the trade creditors of my sons for debts contracted while in business at High Street, Andover, in full, through the trustee, Henry William Edmunds; and further, I agree that whether my said action against the Mutual Society is successful or not, I will pay three hundred pounds per annum to the said trustee until I shall have paid him a sufficient sum to pay the trade-creditors of my aforesaid sons in full."

Such being the facts, it is necessary to consider the legal questions to which they give rise.

The first question is the liability incurred by the defendant to his sons by reason of the seizure of what he has deliberately asserted to be their goods for his debt. That as between the father and the sons, the goods were theirs, we consider established by the father's own statements. Speaking generally, and excluding exceptional cases, where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor. The authorities supporting this general proposition will be found collected in the notes to *Lampleigh* v. *Brathwait* (1) and *Dering* v. *Winchelsea*. (2) As instances illustrating its application, reference may be made to the case of a person whose goods are lawfully distrained for rent due from some one else, as in *Exall* v. *Partridge* (3); to the case of a surety paying the debt of his principal; to the case where the whole of a joint debt is paid by one only of the joint debtors; to the case where the joint property of a firm is seized for the separate debt of one of the partners. The right to indemnity or contribution in these cases exists, although there may be no agreement to indemnify or contribute, and although there may be, in that sense, no privity between the plaintiff and the defendant: see *Johnson* v. *Royal Mail Steam Packet Co.* (1) But it is obvious that the right may be excluded by contract as well as by other circumstances. Where the owner of the goods seized is, as between himself and the person for whose debt they are seized, liable to pay the debt, it is plain that the general rule is inapplicable; and this explains the case of *Griffinhoofe* v. *Daubuz.* (2) There the plaintiff, who was the tenant of the defendant, sued him to recover the value of a stack of wheat distrained for tithe-rent-charge. The declaration alleged that the defendant was liable to pay, and ought to have paid, this rent-charge. The defendant, on the other hand, denied this alleged liability; and upon this part of the case the verdict was entered for the defendant, and the defendant succeeded in the action. The plaintiff, without attempting to disturb the verdict, applied for judgment non obstante veredicto, for alleged error on the record, on the ground that although the defendant was not personally liable to pay the rent-charge, yet his farm and land were liable to pay it, and therefore he ought to indemnify the plaintiff. But it was held that many circumstances might exist rendering the plaintiff the person to pay the tithe rent-charge, and that, having regard to the verdict, the record did not shew that the defendant was liable to indemnify the plaintiff against it. The Court said: "There is no allegation of any privity entitling the plaintiff to recover in any form of action." We are not sure that we quite appreciate the meaning of the word "privity" in this passage: but the truth seems to have been, that the merits as disclosed at the trial were against the plaintiff, and that the Court was not disposed to be astute and to give him judgment after his failure at the trial.

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(1) 1 Sm. L.C. 151.

(2) 1 W. & T. (L.C.) 106.

(3) 8 T. R. 308.

Another exception to the general rule has been held to exist,

(1) Law Rep. 3 C. P. 38.

(2) 5 E. & B. 746.

where the owner of the goods has left them for his own convenience, where they could be lawfully seized for the debt of the person from whom he seeks indemnity: *England* v. *Marsden.* (1) The plaintiff in that case seized the defendant's goods under a bill of sale, but did not remove them from the defendant's house. The plaintiff left them there for his own convenience, and they were afterwards distrained by the defendant's landlord. The plaintiff paid the rent distrained for, and brought an action to recover the money from the defendant. The Court, however, held that the action would not lie as the plaintiff might have removed his goods before, and could not under the circumstances be considered as having been compelled to pay the rent. This appears to us a very questionable decision. The evidence did not shew that the plaintiff's goods were left in the defendant's house against his consent; and although it is true that the plaintiff only had himself to blame for exposing his goods to seizure, we fail to see how he thereby prejudiced the defendant, or why, having paid the defendant's debt in order to redeem his own goods from lawful seizure, the plaintiff was not entitled to be reimbursed by the defendant. This decision has been questioned before by Thesiger, L.J., in 15 Ch. D. 417, and by the late Vaughan Williams, J., in the notes to the last edition of Wms. Saunders, vol. 1, p. 361, and we think the decision ought not to be followed. Be the case of *England* v. *Marsden* (1), however, right or wrong, it is distinguishable in its facts from the case now before us.

In order to bring the present case within the general principle alluded to above, it is necessary that the goods seized shall have been lawfully seized; and it was contended before us that the sons' goods were in this case wrongfully seized, and that the defendant, therefore, was not bound to indemnify them. But when it is said that the goods must be lawfully seized, all that is meant is that as between the owner of the goods and the person seizing them, the latter shall have been entitled to take them. It is plain that the principle has no application, except where the owner of the goods is in a position to say to the debtor that the seizure ought not to have taken place; it is because as between them the wrong goods have been seized that any question arises. Now, in this case it has been decided between the owners of the goods seized (i.e., the sons), and the sheriff seizing them, that the goods were rightfully seized; and although the defendant is not estopped by this decision, and is at liberty, if he can, to shew that the seizure was one which the sheriff was not justified in making, he has not done so. Indeed, the defendant's connection with his sons' business was such as to justify the inference that the sheriff had a right to seize the goods for the defendant's debt, and if, in truth, any mistake was made by the sheriff, the defendant had only himself to thank for it. His own conduct led to the seizure, and although he did not in fact request it to be made, he brought the seizure about, and has wholly failed to shew that the seizure was wrongful on the part of the sheriff.

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(1) Law Rep. 1 C. P. 529.

The case, therefore, stands thus: goods which the defendant has admitted in writing to be his sons', have, owing to his conduct, been legally taken in execution for his debt, and the proceeds of sale have been impounded as a security for what is due from him to the execution creditors. The defendant, therefore, was liable to repay to his sons the amount realized by the sale of the goods. This liability the plaintiff, as the sons' trustee in bankruptcy, was in a position to enforce, and he has never released it or agreed so to do except upon payment of £1200. The plaintiff is in a position now to enforce that liability, if the defendant succeeds in shewing that his express promise to pay £1200 is not legally binding upon him. The plaintiff is content to take the £1200 expressly promised to be paid instead of insisting on his right to the £1300; and Huddleston, B., has properly given the plaintiff judgment accordingly. This appeal must be dismissed with costs.

Judgment for the plaintiff.

Solicitors for plaintiff: *Robinson & Dees, for C. H. Edwards & Gough, Birmingham.*

Solicitors for defendants: *Purkis & Co.*

J. E. H.

1885
March 20.

THE QUEEN *v.* THE JUDGE OF THE CITY OF LONDON COURT AND ANOTHER.

County Court—Actions of Tort—Stay of Proceedings—County Courts Act, 1856 (19 *&* 20 *Vict. c.* 108), *s.* 39—*Employers' Liability Act,* 1880 (43 *&* 44 *Vict. c.* 42), *s.* 6.

Sect. 39 of the County Courts Act, 1856, entitles the defendant "in any action of tort," where the claim exceeds 5*l.*, to a stay of proceedings upon certain conditions as to giving security for the amount claimed, and the costs of trial in one of the superior courts of common law:—

Held, that this section was intended to apply only to actions which could be brought either in one of the superior courts or in a county court, and therefore did not apply to an action under the Employers' Liability Act, 1880, which by s. 6 of that Act must be brought in a county court.

Rule calling upon the judge of the City of London Court and Philip Maskell, the plaintiff in an action of *Maskell* v. *Lucas and Another*, to shew cause why a writ of prohibition should not issue to prohibit them from further proceeding in the matter of the action.

The action was commenced in the City of London Court on the 28th of April, 1884, to recover damages for personal injuries under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42). The defendants, on the 28th of April, gave notice, under s. 39 of 19 & 20 Vict. c. 108 (the County Courts Act, 1856), that they objected to the action being tried in the county court, and gave security for the amount claimed and costs.

The action was accordingly stayed in the City of London Court, and the plaintiff on the 1st of July commenced an action in the Queen's Bench Division in respect of the same cause of action. The defence was delivered in the action in the Queen's Bench Division on the 26th of July.

The plaintiff and his advisers having become doubtful whether the course which had been pursued was the proper one, on the 27th of November an application on behalf of the plaintiff was made to the judge of the City of London Court to restore the original action in that court to the list for trial. The consideration of this application was adjourned. On the 29th of November, notice of discontinuance of the action in the Queen's Bench Division was given by the plaintiff to the defendants.

On the 5th of December the judge of the City of London

Court, ordered the action originally brought in that court to be restored to the list for trial.

This rule was thereupon obtained by the defendants.

Horne Payne, for the plaintiff, shewed cause. Sect. 39 of the County Courts Act, 1856 (1), does not apply to actions for compensation under the Employers' Liability Act, 1880, which by s. 6 must be brought in a county court. [He was stopped.]

McCall, supported the rule. The defendants are entitled to a stay of proceedings in the action in the City of London Court. An action for compensation under the Employers' Liability Act, 1880, is an "action of tort" within the meaning of s. 39 of the County Courts Act, 1856. The Employers' Liability Act gives no new cause of action. It only removes the defence of common employment in six specified cases.

[MATHEW, J. The action of tort referred to in s. 39 means an action of tort which could as of right be brought in the superior courts.]

That construction would involve reading words into the Act. The words of s. 39 are wide enough to cover all actions of tort, and the fact that the legislature, when the County Courts Act, 1856, was passed, did not contemplate the passing of the Employers' Liability Act, ought not to induce the Court to limit the construction.

MATHEW, J. I am of opinion that this rule must be discharged. Sect. 6 of the Employers' Liability Act enacts in clear terms that every action for compensation under that Act shall be brought in the county court; but may be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may be removed. This case has not been removed in the mode pointed out in the latter part of s. 6; but it is said that the action in the City of London Court should be stayed because s. 6 must be read with s. 39 of the County Courts Act, 1856, which gives the defendant in actions of tort, when the claim exceeds 5*l.*, a right to have the proceedings stayed in the county court upon his giving security as that section directs. I am clearly of opinion that an "action of tort" in s. 39 of the County Courts Act, 1856, means an action of tort which could have been brought either in the county court or in one of the superior courts. This action could not have been brought in a superior court. The legislature in enacting s. 39 of the County Courts Act, 1856, did not contemplate such an action of tort as is given by the Employers' Liability Act. I think that s. 39 does not apply in this case.

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(1) By 19 & 20 Vict. c. 108, s. 39, "If in any action of contract the plaintiff shall claim a sum exceeding 20*l*., or if in any action of tort the plaintiff shall claim a sum exceeding 5*l*., and the defendant shall give notice that he objects to the action being tried in the county court, and shall give security, to be approved of by the registrar, for the amount claimed, and the costs of trial in one of the superior courts of common law, not exceeding in the whole the sum of 150*l*., all proceedings in the county court in any such action shall be stayed. . . . . Provided that nothing herein contained shall prevent the removal of any cause from a county court by writ of certiorari in the cases and subject to the conditions in and subject to which such cause may now be removed."

By s. 6 of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), "Every action for recovery of compensation under this Act shall be brought in a county court, but may, upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed."

SMITH, J. I am of the same opinion. It is said that s. 39 gives the defendant a right to a stay of proceedings when the claim is over 5*l.*, notwithstanding that the action could not have been brought in the superior court. At the time the County Courts Act, 1856, was passed all actions of contract for amounts however small could be brought in the superior courts. Then s. 39 intended that, if actions claiming more than a certain amount in contract or in tort were brought in the county court, the defendant, on giving security might drive the plaintiff to sue in the superior court. It was not intended to include in the operation of s. 39 actions which by statute could only be brought in the county court. I agree that the rule should be discharged.

Rule discharged.

Solicitors for plaintiff: *Ranger & Burton.*
Solicitors for defendants: *Cope & Co.*

W. A.

[IN THE COURT OF APPEAL.]

1885
March 12.

LUND *v.* CAMPBELL AND OTHERS.

Practice—Costs—Claim for Debt and Counter-claim for Debt—Arbitration—Order of Reference—" Costs of cause, reference, and award, shall abide the event"—Award—Entry of Judgment—Costs where the Plaintiff succeeds on Claim, and the Defendant on Counter-claim—Costs of Issues found in favour of Party, against whom Judgment in Action is entered.

A plaintiff having claimed for goods sold and delivered, and for commission, and the defendants having counter-claimed for moneys collected by the plaintiff on the defendants' account and for work and labour, the action was referred to an arbitrator under an order of reference whereby " the costs of the cause, and the costs of the reference and award shall abide the event." The arbitrator found the issues on the claim in favour of the plaintiff, and awarded him a sum of money in respect thereof, and found the issues on the counter-claim in favour of the defendants, and awarded to them a sum of money in respect thereof. After deducting the sum found for the plaintiff from the sum found for the defendants, a balance of 97*l.* was due to the defendants :—

Held, that the word " event " in the order of reference must be construed distributively, and that judgment must be entered for the defendants, who were entitled to the costs of the action, reference, and award, but that the plaintiff was entitled to the costs of the issues found in his favour.

Baines v. *Bromley* (6 Q. B. D. 691) explained.

Action for goods sold and delivered and for commission. By their defence and counter-claim the defendants pleaded many alleged facts by way of denial of the plaintiff's claim, and then by way of counter-claim sought to recover for moneys collected by the plaintiff on the defendants' account, and also for work and labour done at the plaintiff's request. There were subsequent pleadings, and ultimately the action was referred to an arbitrator by an order of a master. By the order of reference it was provided that " the costs of the said cause and the costs of the reference and award shall abide the event." By his award the arbitrator found that the defendants were indebted to the plaintiff in the sum of 508*l.* 17*s.* for goods sold and delivered, and in the sum of 313*l.* 15*s.* for commission, and he found all the issues joined upon the defence to the plaintiff's claim in his favour. With respect to the counter-claim, the arbitrator found that the plaintiff was indebted to the defendants in the sum of 783*l.* 12*s.* 10*d.* for moneys collected by him on the defendants' behalf, and in the sum of 136*l.* 2*s.* 7*d.*, for work and labour done at the plaintiff's request, and he found the issues joined upon the reply to the counter-claim for the defendants. After setting off the amount found for the plaintiff against that found for the defendants, there remained a balance of 97*l.* 3*s.* 5*d.*, which the arbitrator awarded should be paid to the defendants. The plaintiff thereupon entered judgment in the action, that the plaintiff should recover against the defendants *l.*, for costs of his suit, which costs were by a master's certificate, dated the day of , allowed at *l.*, and that the defendants should recover against the plaintiffs 97*l.* 3*s.* 5*d.*, on the counter-claim, and *l.* for their costs. The defendants took out a summons to set aside the judgment signed in the action, or to amend it so far as it provided for the plaintiff recovering any costs, and to provide that the defendants should recover full costs of suit. Field, J., having dismissed the summons, the defendants appealed to the Queen's Bench Division, where Grove and Manisty, JJ., set aside the judgment signed by the plaintiff, and gave the defendants liberty to sign such judgment as they should think fit. The plaintiff appealed to the Court of Appeal.

J. P. Aspinall, for the plaintiff. The judgment entered by the plaintiff is supported by the authority of *Baines* v. *Bromley* (1): it is in the same terms as the judgment entered in that case, which ought to be followed upon the present appeal. The defendants may contend that as in *Baines* v. *Bromley* (1) there was no appeal against the form of the judgment, the Court merely determined what was the proper principle as to the taxation of costs upon the judgment as entered. This, however, is too narrow a view of the effect of the decision. *Baines* v. *Bromley* (1) appears to have been approved of in the case of *In re Brown, Ward* v. *Morse* (2). The real question is what is the meaning of the expression "event," which occurs in the order of reference. It was held in *Myers* v. *Defries* (3) that the word "event" occurring in Rules of the Supreme Court, 1875, Order LV., must be read distributively; and a similar interpretation must be given to the word when it occurs in an order of reference: *Ellis* v. *Desilva* (1); but this construction will give the present defendants only the costs of those issues upon which they have succeeded.

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(1) 6 Q. B. D. 691.

(2) 23 Ch. D. 377.

(3) 5 Ex. D. 15, 180.

[LINDLEY, L.J. The judgment of the majority of the Court in *Stooke* v. *Taylor* (2), supports the decision in *Ellis* v. *Desilva.* (1)

LORD COLERIDGE, C.J. No doubt *Chatfield* v. *Sedgwick* (3) is distinguishable from the present case, but the reasons for the decision are against the plaintiff as to the right to the costs of the action. Has it been held in any case that where the plaintiff recovers some amount as a debt, and the defendant by a counter-claim recovers a greater amount also in debt, nevertheless the plaintiff is entitled to the general costs of the action?]

Perhaps not, but at least this principle as to the taxation of costs has been established by the decisions, that where the counter-claim is for an unascertained amount which the plaintiff could not be expected to know, he gets the costs of the cause, although the defendant succeeds on the counter-claim to a greater amount than the plaintiff does on the claim; and the reason is that the defendant has taken advantage of the action brought against him to enforce his claim against the plaintiff. Another principle as to taxation is, that where before the Judicature Acts 1873 and 1875, a defendant could not have enforced his claim by way of set-off, the plaintiff is justified in bringing an action, and is entitled to the costs of it. Under the powers conferred by the order of reference, the arbitrator has found really in the plaintiff's favour.

Moreover, even if the plaintiff is not entitled to enter judgment in the action, such a judgment ought to be entered as will entitle him to the costs of the issues found in his favour: *Cole* v. *Frith.* (4)

Lawson Walton, for the defendants. The Queen's Bench Division in effect held that the form of the judgment entered by the plaintiff was wrong, and that the defendants, being successful, were entitled to draw up their own judgment. The judgment as entered by the plaintiff would give to him the costs of the action, reference, and award. The proper form is that judgment shall

(1) 6 Q. B. D. 521.
(2) 5 Q. B. D. 569.
(3) 4 C. P. D. 459.
(4) 4 Ex. D. 301.

be entered for the defendants for 97*l.* 3*s.* 5*d.* and their costs. The "event" is in their favour.

[LORD COLERIDGE, C.J. The master now present in court informs us that upon a judgment in the form suggested on behalf of the defendants, the costs of the issues upon which the plaintiff has succeeded, would not be taxed in his favour.]

Upon a judgment in the form suggested on behalf of the defendants, it would be the duty of the master at the taxation to look at the specific findings, and to award costs according to the entry of them for the plaintiff or for the defendants. It cannot be right that plaintiff should be at liberty to enter judgment, because he has succeeded upon some minor point.

J. P. Aspinall, in reply.

LORD COLERIDGE, C.J. In this case the plaintiff has brought an action against the defendants to recover a considerable sum of money for goods sold and delivered, and for commission. The defendants counter-claimed—and that is a fact which it is material to remember, with a view to the decisions which we have to consider—for certain sums of money collected by the plaintiff on their behalf, and also for work and labour done for the plaintiff. The action proceeded to rejoinder, and then was referred to an arbitrator. He heard the case at considerable length, and finally, by his award, found in substance that the whole of the plaintiff's claim was proved. He then proceeded to consider the counter-claim of the defendants, and although he somewhat reduced the amount of it as to the items for work and labour, he found that the alleged payments had been made, and that the work and labour claimed for had been executed. Adding the payments and the items for work and labour together, he brought out a sum of 919*l.* 15*s.* 5*d.* due to the defendants, and he found a sum of 822*l.* 12*s.* to be due from the defendants; and he then proceeded to award that the plaintiff should pay to the defendants the sum of 97*l.* 3*s.* 5*d.*, the balance.

Now comes the question, what is the proper form of judgment to be entered up on that finding of the arbitrator? and that depends upon the further question, what is the meaning of the word "event" contained in the order of reference, upon which the costs of the cause, reference, and award are to turn? On the part of the defendants it has been successfully contended before the Queen's Bench Division, that at all events the judgment, which the plaintiff has taken upon himself to sue out and to enter, is wrong. It has been said that the effect of it, if it had been left unchallenged, would have been to give to the plaintiff the general costs, that is, the costs of the action and, I suppose, of the reference and award. If the successful result of the plaintiff's action—I cast aside for the moment the counter-claim—is the true meaning of the word "event," I see no reason why it should be confined to the costs of the cause. The costs of the cause, reference, and award, would all have had to be borne by the defendants, who, according to all ordinary understanding, were the successful parties in the litigation. It was contended that in *Baines* v. *Bromley* (1), decided in this Court, it had been held that where a plaintiff brings an action in contract, and the defendant, instead of contenting himself with pleading a set-off and succeeding upon it, goes on to counter-claim in contract to a greater extent than would be necessary to sustain the set-off, and succeeds upon the counter-claim, although, in the first case, he would have been entitled to the costs of the cause, in the second he would be disentitled to them, and the plaintiff would get them all. Of course, if that had been decided in this court, we should have been bound to submit to the decision; but the law would certainly have been in a singular state. And it appears, upon closely looking into *Baines* v. *Bromley* (1), that nothing of that sort has been decided. It is true that the judgment in that case is, mutatis mutandis, in the same words and form as this; but the Court, in *Baines* v. *Bromley* (1), pointed out that they were not asked to set aside or reform the judgment, but merely to say whether a taxation had under the words of the judgment was proper. It is true that in that case the taxation seems to have had the effect which, I have pointed out, was unreasonable; but the distinction between that case and this is obvious. In order to avoid the consequences which the fact of not challenging the form of the judgment forced upon the Court in *Baines* v. *Bromley* (1), here the form of the judgment is challenged, and we

(1) 6 Q. B. D. 691.

are asked to reform the judgment, to prevent the technical consequences which came before the Court of Appeal in that case. When the judgment of the present Master of the Rolls is looked at, it will be found that although it was only a dictum as to this point—it was nevertheless an important and clear dictum—and although he did not dissent from the view that the plaintiff was entitled to his costs of suit, his opinion was that in a case of this sort, where there is a claim on one side arising out of a contract, and a claim on the other side also arising out of a contract, and the defendant has succeeded to a greater extent than the plaintiff, the defendant is entitled to the general costs of the cause, and the unsuccessful plaintiff is entitled to set off against those costs—whether or not the plaintiff's costs overtop the defendant's—the costs of the issues upon which the plaintiff has succeeded. We were pressed also with *Ellis* v. *Desilva* (1), an authority to which I entirely defer, by which it was decided that in an order of reference the word "event" must be read distributively, and that it does not mean the single event of the arbitration, which all the costs are to follow, without any distribution of them in favour of the person who has succeeded on some of the issues, but that the word "event" in such an order as this means "events," and that when the arbitrator has ascertained various issues, some in favour of the plaintiff and some in favour of the defendant, the party who succeeds upon the whole is entitled to general costs, but the unsuccessful party is entitled to the costs of the issues upon which he has succeeded. The justice of that course, and how it works out, is shewn very ably by the late Lord Chief Justice in the case of *Stooke* v. *Taylor* (2), to which reference has been made. With every word uttered in that judgment on this point, I agree. The injustice of any other course is well pointed out; and the justice of construing "event" where it can be so construed, distributively, so as to give the costs to the persons who succeed in proportion to their success, I absolutely concur in.

Those two principles seem to be established in the cases; first of all, that the party who in an action of this sort upon the whole succeeds, is entitled to the general costs; but that the word "event" is to be construed distributively, and that the costs of

(1) 6 Q. B. D. 521.

(2) 5 Q. B. D. 569.

the issues as to which the party who upon the whole is unsuccessful has been successful, are to be allowed to him.

Those two principles being ascertained and being manifestly supported by good sense, how are they to be applied to the case before us? In this case the words are, "costs of the cause, reference, and award shall abide the event." What is the "event" here? It is true that there are a claim and a counter-claim, and not merely a claim and a set-off. It is also true that there may not only be a technical, but a substantial distinction between a "set-off" and a "counter-claim." It is also true that the defendant by setting up a counter-claim in answer to a claim, does get a certain advantage, because he saves himself the expense of an action of his own, and he gets advantages by putting forward a set-off, in the shape of a counter-claim. Still, in this case there has been one inquiry. There has been one examination by the arbitrator of the two sides of the account; and the accounts having been so investigated resulted in a balance, to use the arbitrator's own words, of nearly 100*l.* in favour of the defendants; and that balance, it is to be observed, is the only sum which the arbitrator awards to be paid. He decides that the other sums are to be allowed—that the other sums have been justly claimed by the plaintiff and up to the time of award the defendants were indebted in those sums. He finds also that the plaintiff was indebted to the defendants in certain other sums; and the only award of payment that he makes is an award of payment of a certain sum, namely 97*l.* 3*s.* 5*d.*, to the defendants from the plaintiff. It seems to me plain that that is the "event" of the arbitration, and that the costs of the cause and the reference and the award ought to follow that event, and ought to follow that event in favour of the defendants. Then it is plain that the present form of judgment under which, it is admitted on both sides, the plaintiff would get those costs instead of the defendants, must be wrong because it would give him those costs to which he is not entitled.

Then what is the proper form to be adopted, and what ought we to do? Simply to set aside this judgment would not be in our opinion quite the proper step to take. That is all the Divisional Court did, they reversed the finding of Field, J., and set aside the judgment. Merely to set aside the judgment would leave the defendants at liberty to enter the judgment as they thought fit. With every desire to give credit for a right feeling to the defendants, it is just possible that the defendants might enter judgment in a form that would be unfair to the plaintiff, and give the plaintiff a deal of trouble. Therefore it seems to me that the proper step for us to take, is to reform this order of the Divisional Court, and setting aside the judgment, to hold that the proper form of judgment is, to enter the judgment for the defendants with costs of the cause, reference, and award; but that the plaintiff is to be allowed upon taxation the costs of all such issues as he has succeeded upon. If there are any costs of the cause which the plaintiff has incurred, and which the defendants have not incurred, they will not be entitled to them, but such costs of the cause, reference, and award as the defendants have properly incurred, they are entitled to be re-imbursed by the plaintiff. That therefore, as it seems to me, meets the justice of the case.

I am not aware that we are interfering with anything that has been expressly decided in this Court or elsewhere. So far as I can see, we are not interfering with anything which has been even impliedly decided in this Court or elsewhere; but if we are doing so, at any rate it seems to us that in this case upon the words of the order of reference, the true meaning of the agreement come to between the parties is what I have said, and that the judgment should be entered, and the costs taxed on the principle which I have endeavoured to explain.

SIR JAMES HANNEN. I have nothing to add on the general features of the case. I only wish to say that I think the Court below was technically right in setting aside this judgment, but no doubt it is better that an amendment should be made in the judgment to render it clear in what manner the costs ought to fall on the respective parties.

LINDLEY, L.J. I also think that the order appealed from is substantially right, although in form it ought to be amended in such a way as to prevent any future discussion or dispute. The point before us does not appear to be altogether free from difficulty, because when we look closely at the authorities we find them standing in this position. In the first place, the question that we have to consider is not the construction of a judgment already drawn up—we are not embarrassed with that at all—and nothing that we shall say or decide will conflict with any decision, as I understand, of this or any other Court. It is not in conflict with *Baines* v. *Bromley* (1), in which the judgment had been drawn up, and the question was how the costs were to be taxed on the judgment as drawn up.

The question in this case is how the judgment ought to be drawn up. At the same time there are observations of the present Master of the Rolls in *Baines* v. *Bromley* (1) which go far to shew that the decision at which we have arrived is correct.

The broad outline of the present case is this. There was a reference to arbitration, and the costs of the action, the reference, and the award were to abide the event, and the person in whose favour the arbitrator should decide was to enter up judgment with such costs as he was entitled to. Now the word "event" has given rise to a great deal of controversy, and it has been contended more than once that the word "event" means simply the judgment in favour of the person, for whom a sum is recovered; therefore it is said here, on the one hand, that the "event" has been found by the arbitrator in favour of the defendants. That is true, but it is not wholly true, because although the event in that narrow sense is in their favour, yet they have failed in very material points and upon certain very material issues. It was with the object of preventing any injustice that the Court when presided over by Bramwell, L.J., in the case of *Ellis* v. *Desilva* (2), sent the award back, because the arbitrator had not shewn on which of the points in controversy, if any, the party in whose favour the small balance was found had failed: the Court of Appeal declined to give him all the costs of the action, and as there was no discrimination between those issues on which he had failed and those on which he had succeeded, the award was sent back in order that the arbitrator should find the specific issues. Here we must be careful to avoid doing the injustice that would be occasioned, if there were a simple judgment for the defendants

(1) 6 Q. B. D. 691.

(2) 6 Q. B. D. 521.

Lindley, L.J.

for 97*l.* 3*s.* 5*d.* and costs, and they were not to be made to pay the costs of the issues on which they have failed. There seems to be some doubt as to how the master would tax under that simple form of order, and it is to remove that doubt that we insert the words to the effect that the Lord Chief Justice has stated.

But when we come to the broad question as to which party ought to pay the costs of the action, I must point out that the defendants will only get under the taxation the costs incurred by themselves. No master would tax on a different principle. That stands to reason. But upon this order of reference it appears to me that we are acting in conformity with the view taken in *Chatfield* v. *Sedgwick* (1); in conformity with the view taken in *Stooke* v. *Taylor* (2); in conformity with the view taken by the Court in *Ellis* v. *Desilva* (3), and above all in conformity with the case which I do not think has been referred to in the course of the argument, but which I have found, namely, *Lowe* v. *Holme* (4), in which the question was how the judgment should be entered. In this case judgment ought to be entered for the defendants for 97*l.* 3*s.* 5*d.* with costs of the action, reference, and award, but the judgment ought to go on to direct that the defendants must pay the costs of the issues on which they have failed. That seems to be necessary to be stated to prevent further misapprehension. It seems to me that the plaintiff having substantially failed here ought to pay the costs of the appeal.

Judgment for the defendants. (5)

Solicitors for plaintiff: *Lowless & Co.*

Solicitors for defendants: *J. E. & H. Scott*, for *George Armstrong & Son*, Newcastle-upon-Tyne.

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(1) 4 C. P. D. 459.

(2) 5 Q. B. D. 569.

(3) 6 Q. B. D. 521.

(4) 10 Q. B. D. 286.

(5) By the order of the Court of Appeal it was directed "that the appeal be dismissed with costs to be taxed and paid by the plaintiff to the defendants or their solicitor, and that the defendants have the costs occasioned by the judgment having been wrongly entered other than the costs of the application before Field, J., and that judgment be entered for the defendants with costs of cause, reference, and of award which they have incurred, and it is further ordered that the plaintiff have the costs of those issues upon which he has succeeded."

J. E. H.

BUTLER *v.* BUTLER.

1885
Feb. 28.

Husband and Wife—Action by Husband against Wife—Separate Estate—Money paid by Husband for Wife before and after Marriage—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 2, 3, 4; *ss.* 3, 12, 13.

A husband is entitled to maintain an action against his wife, and to charge her separate property for money lent by him to her after their marriage, and for money paid by him for her after their marriage at her request made before or after their marriage, but he is not entitled, even since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), to maintain any action against her for money lent to her or money paid for her before their marriage at her request.

Action by husband against his wife to recover 1848*l.* out of her separate estate, for money paid on her behalf.

Defence (amongst others), that in the circumstances the defendant was not legally liable. Joinder of issue.

Feb. 26. The case was tried before Wills, J., and a common jury, at the Royal Courts of Justice, when it appeared that the defendant before her marriage carried on business as a provision dealer, and on the 23rd of January, 1883, the plaintiff, at her request, paid 70*l.* 18*s.* for provisions supplied to her and 34*l.* 12*s.* for repairs to the house where she carried on business. On the 7th of April, 1883, the plaintiff and the defendant were married, and afterwards lived together, but she continued to carry on business at her former place of business. The plaintiff made other payments for the defendant at her request after the marriage in respect of moneys due from her before the marriage. In some cases the request had been before, and in others it was after the marriage. With regard to the residue of the amount claimed, it was paid or advanced by the plaintiff after the marriage. Part was paid to the wife at her request, to be spent upon building speculations of her own (after the marriage), and the residue was paid to different creditors of the wife at her request, and upon her promise to repay the money out of her separate estate.

On the 2nd of August, 1883, the defendant signed an instrument in writing charging her separate estate with part of these advances, and she also rendered an account, giving her husband credit for 1300*l.*

It was agreed that the question whether, upon these facts, the defendant was legally liable, should be first considered.

Kemp, Q.C., and *Henry Kisch*, for the plaintiff. The plaintiff's claims are of three kinds. First, in respect of payment before marriage for the wife's debts contracted before marriage; second, in respect of payments after marriage in respect of debts contracted before marriage; and third, in respect of payments after marriage in respect of debts contracted by her after marriage. With regard to all three classes the effect of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-ss. 2, 3, 4, ss. 12 and 13, is to charge a married woman's separate estate not only as regards contracts with third parties, but also as between her and her husband. By s. 1, sub-s. 2, a married woman may make herself liable in respect of her separate property on "any" contract, and to be sued in contract "in all respects as if she were a feme sole," and her husband need not be joined with her as plaintiff or defendant. The effect of this sub-section is to destroy the Common Law doctrine of conjugal unity, which was all that prevented the husband from suing his wife in a court of law. Sub-sect. 3, makes any contract by a married woman, whether in writing or not, a contract with reference to her separate property. By s. 12 every married woman has against her husband the same civil remedies for the protection of her separate property as if she were a feme sole, and it must be taken that the husband's rights as against her are reciprocal. Sect. 13 enacts that a woman after marriage is to remain liable for debts contracted before marriage, and as between herself and her husband, "unless there be any contract between them to the contrary," her separate property is to be primarily liable. Sect. 14 makes the husband liable as before for such debts to the extent of property of the wife acquired by him upon the marriage, and the effect of the two sections must be to enable the husband to recover from the wife out of her separate estate money paid by him in discharge of ante-nuptial debts. *Bursill* v. *Tanner* (1) decides that since the Act judgment may be obtained against a married woman generally, though execution will be limited to her separate estate, which goes to shew that the effect of the Act is to destroy the Common Law doctrine as to the unity of husband and wife. In *Mander* v. *Harris* (1), Cotton, L.J., assumes that the Act was intended to alter the rights of husband and wife inter se. In *In re Martin, Butterfield* v. *Mott* (2), Bacon, V.-C., appears to recognise the right of a husband to sue his wife since the Act. Further, the action must be decided according to the rules of Equity, and it is well established that in Equity a wife may enter into a contract for valuable consideration with her husband: *Hewison* v. *Negus* (3), per Romilly, M.R.; *Woodward* v. *Woodward* (4) is to the same effect.

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(1) 13 Q. B. D. 691.

[They cited with reference to the liability of the wife's estate for payments after marriage in respect of debts before and after marriage: *Vansittart* v. *Vansittart* (5); *Teasdale* v. *Braithwaite* (6); *In re Foster & Lister* (7); *Nicol* v. *Jones* (8), and with reference to the construction of the Act, Montague Lush on Husband and Wife, pp. 165, 395.]

Rose-Innes, for the defendant. First, the Act was intended, as were the previous Married Women's Property Acts, to protect the wife in the enjoyment of her separate property. It was never intended to give the husband fresh remedies against his wife which he did not possess before the Act. It was only intended to affect the wife's liability with regard to strangers. *Cahill* v. *Cahill* (9) shews that the wife, as regards the power to contract with her husband, is not in the position of a feme sole.

Cur. adv. vult.

Feb. 28. WILLS, J., delivered judgment as follows. This is an action by a husband against his wife seeking to have it declared that, first, moneys lent by him to her before marriage, secondly, moneys lent by him to her after marriage are a charge upon her separate estate, and asking for the necessary inquiries in order to give effect to his claim.

The marriage took place on the 7th of April, 1883. The wife was carrying on a business of her own as a provision dealer. They

(1) 27 Ch. D. at p. 170.
(2) W. N. 1884, 164.
(3) 16 Beav. 598.
(4) 3 De G. J. & S. 672.
(5) 4 K. & J. 62.
(6) 5 Ch. D. 630.
(7) 6 Ch. D. 87.
(8) Law Rep. 3 Eq. 709.
(9) 8 App. Cas. 420.

lived away from the place of business, and she carried on the business after marriage apart from her husband. Before the marriage the plaintiff had, at the request of the defendant, paid sums of money for her to pay debts she owed in business. After marriage he paid other sums at her request, and he lent her other sums, as to some of which at all events there is evidence that she proposed to him to charge them upon her separate estate.

It is objected that no action will lie. The moneys advanced before marriage constituted it is admitted ante-nuptial debts. To them and to the loans and payments upon request made after marriage very different considerations apply. I will consider first the case of the loans and payments upon request made after marriage.

Now I take it to be clear that in the ordinary sense in which we understand a mere personal contract, neither at law nor in equity can there be any contract between husband and wife. I take it to be equally clear that this general rule is subject to the qualification that with respect to the wife's separate estate free from restraint upon anticipation she is competent to contract and to contract with her own husband: *Hewison* v. *Negus* (1); *Vansittart* v. *Vansittart*. (2) It is difficult to see any difference in principle between cases in which mutual stipulations in post-nuptial settlements have been enforced on the ground of such capacity to contract, or in which such settlements have been upheld against creditors as not being voluntary, and a case like the present in which a contract of loan is sought to be upheld. *Woodward* v. *Woodward* (3) is a very distinct authority to this effect: "This Court," says Lord Westbury, "has established the independent personality of a feme covert with respect to property settled to her separate use. It is a remarkable instance of legislation by judicial decision, whereby the old common law has been entirely abrogated and the power of the wife to contract with her husband has been established. It is quite clear that if money, part of the income of her separate estate, be handed over by her to her husband, upon a contract of loan, the wife may sue her husband upon that contract." (4)

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(1) 16 Beav. 594, 598.

(2) 4 K. & J. 62, 70.

(3) 3 De G. J. & S. 672.

(4) Ibid. at p. 674.

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If the capacity to contract exist the power and the remedy must alike be mutual, and the husband must be able to sue the wife as well as the wife the husband, and indeed in many cases undistinguishable in principle from this the husband has sued in Courts of Equity. As to some of these claims the wife is alleged to have expressly charged or promised to charge her separate estate; as to others, she merely appears to have borrowed them or requested her husband to pay them under such circumstances (it is to be assumed for the purposes of my present decision) as but for the relation of husband and wife would have raised a legal obligation to repay the money advanced by the husband. But this distinction has, I think, no effect upon the rights of the parties, inasmuch as by s. 1, sub-s. 3, of the Married Women's Property Act, 1882, "every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shewn."

As to the post-nuptial loans and advances by the husband therefore I think the plaintiff has a right of action.

To the ante-nuptial advances very different considerations apply. There is no doubt that prior to the Married Women's Property Act, 1882, no such action could have been maintained, but it is alleged that it will now lie under the provisions of that Act. It is necessary therefore carefully to examine its provisions bearing upon this question.

By s. 12 it is enacted that "Every woman whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies for the protection and security of her own separate property, as if such property belonged to her as a feme sole." This enactment, however, is silent as to any correlative rights of the husband, and has no application to a claim by the husband upon the wife's separate estate. It is urged that the Act must have meant to give the husband correlative rights in respect of the separate property of the wife. I answer, I do not see why. I take the Act to mean exactly what it says—no more and no less. It is said that it destroys the doctrine of the common law by which there was what has been called a unity of person between husband and wife. Again I answer, I do not see why. It confers in certain specified cases new powers upon the wife, and in others new powers upon the husband, and gives them in certain specified cases new remedies against one another. But I see no reason for supposing that the Act does anything more than it professes to do, or either abrogates or infringes upon any existing principles or rules of law in cases to which its provisions do not apply. I pass therefore to s. 13, which deals with the wife's responsibility in respect of ante-nuptial liabilities whether arising out of contracts or tort. It is provided that "a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, ... and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof."

The words of the earlier part of the section are large enough to cover the present contention of the plaintiff, but it is very material to observe that they apply equally to torts as well as to contracts, yet is expressly provided by s. 12, that with the exception of the very special case to which s. 10, refers, no husband or wife shall be entitled to sue the other for a tort. If s. 13, had been intended to cover cases of claims by a husband as well as those by a stranger against the wife it would scarcely have failed to have some reference to the enactment immediately preceding that no husband should be able to sue a wife for a tort. The provision as to the primary liability between husband and wife is apparently intended to apply to the whole of the area covered by the preceding parts of the section, and yet it is insensible as applied to the case of an action for claims of the husband against the wife's separate estate. A proviso follows which does not, I think, throw further light upon the question, and is only worth a passing notice as a curious specimen of drafting. In an Act repealing two other Acts, and professing in terms to consolidate and amend their provisions, they are referred to in such a manner that it would be impossible to understand the present enactment without an examination of the whole of the provisions repealed.

Sects. 14 and 15 contain important provisions concerning the husband's responsibility for his wife's ante-nuptial liabilities whether of contract or tort. They are of course applicable only to actions by strangers. They are obviously intended to be supplementary to the provisions of s. 13, and they confirm, in my opinion, the view that in no part of this group of sections was it intended to deal with ante-nuptial claims either of husband or wife against one another.

Sect. 17, which provides a summary remedy in case of certain classes of disputes as to property between husband and wife, has no application to or bearing upon the present question.

There remain only to be considered the provisions of s. 1, sub-s. 2, whereby it is enacted that a married woman shall be capable of suing and being sued either in contract or in tort or otherwise in all respects as if she were a feme sole. This provision, however, affects mode of procedure. The section dispenses in terms with the necessity of joining the husband as plaintiff or defendant, and I am of opinion that, except as to a contract made by a woman whilst under coverture, it was not intended to enlarge any rights or liabilities of either husband or wife apart from those which may necessarily flow from the fact that the husband need no longer be joined as a matter of procedure, which will have principally to do with liabilities to costs.

I am of opinion, therefore, that in respect of the ante-nuptial liabilities of wife to the husband the action cannot be maintained. Payments made by him after marriage upon requests antecedent to marriage are liabilities arising after marriage and fall under the first head of claim which I have discussed.

Judgment accordingly.

Solicitors for plaintiff: *Van Sandau, Cumming & Armitage.*
Solicitor for defendant: *C. A. Angier.*

A. P. S.

1885
March 20.

WEGUELLIN, Appellant; WAYALL, Respondent.

Revenue—Inhabited House Duty—Exemption—Caretaker—Servant or other Person—Customs and Inland Revenue Act, 1878 (41 *Vict. c.* 15), *s.* 13, *sub-s.* 2.—*Customs and Inland Revenue Act*, 1881 (44 *Vict. c.* 12), *s.* 24.

A female caretaker resided on premises, and it was a condition of her employment that her son, who was a clerk employed elsewhere, should sleep on the premises for their better protection:—

Held, that the premises were not exempt from inhabited house duty under 41 Vict. c. 15, s. 13, sub-s. 2.

Case stated by the Commissioners of Income Tax for the city of London by way of appeal against an assessment to the inhabited house duties made by the Surveyor of Taxes, as assessor of inhabited house duties, under the Act 43 & 44 Vict. c. 19, s. 43, for the year ending the 5th of April, 1884, upon premises, 7, Austin Friars, and 57½, Old Broad Street, in the city of London.

The premises, which consist of one house containing three floors, and the attics, are let to and occupied by merchants and traders, and are used for business purposes only. No persons sleep on the premises at night other than the following: viz., Sarah Phillips, widow, who has been for many years and is now, the caretaker of the premises, her son, W. G. Phillips, aged twenty-two, who is a clerk in the employ of a firm of merchants carrying on business elsewhere, a daughter, aged nineteen, and a servant. The caretaker being a woman, it is a condition of her employment that the son shall sleep on the premises for increased safety.

The caretaker with the above persons occupy five attic rooms, and no rent is received by the appellant in respect of such occupation.

The surveyor of taxes contended that the son W. G. Phillips being a clerk, his residence deprived the appellant of his claim to exemption, W. G. Phillips not being a servant or other person within the terms of the exemption in 41 Vict. c. 15, s. 13, sub-s. 2, as defined by 44 Vict. c. 12, s. 24, and that the premises were liable to be assessed to the duties on inhabited houses.

The appellant contended to the contrary, and that W. G.

Phillips having been and being now a member of the caretaker's family his employment as a clerk did not render the premises liable to the duties.

The commissioners were of opinion that the appellant was chargeable with the duties, and confirmed the assessment.

The question for the opinion of the Court was whether, under the circumstances, the premises constituted an inhabited house within the meaning of the Act so as to be liable to the payment of the inhabited house duty.

Black, for the appellant. The mother and son here constitute between them a caretaker. It is a term of the employment that the son shall reside on the premises, and consequently this is not the case of a caretaker lodging his family in the house, but of the duty of taking care of it being shared by two persons. The son is in the house, not in the character of a member of his mother's family, but as a person in charge, and consequently the exemption applies.

[He referred to *Yewens* v. *Noakes* (1) and *Rolfe* v. *Hyde*. (2)]

A. V. Dicey, for the respondent, was not called on.

MATHEW, J. I think the judgment of the commissioners here is quite right. Looking at the two sections we have before us there appears to be no room for doubt. Under the earlier statute 41 Vict. c. 15, s. 13, sub-s. 2, it is provided "Every house or tenement which is occupied solely for the purposes of any trade or business or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof," servant or other person clearly contemplating a single caretaker. So far as the mother is concerned her living in the house would not render it liable to duty. By 44 Vict. c. 12, s. 24, it is provided that "with reference to the exemption from the duties on inhabited houses given by sub-s. 2 of s. 13 of the Customs and Inland Revenue Act, 1878, the term 'servant' shall be deemed to mean and include only a menial or domestic servant employed by the occupier, and the expression 'other person' shall be deemed to mean any person of a similar grade or description not otherwise employed by the occupier, who shall be engaged by him, to dwell in the house or tenement solely for the protection thereof."

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(1) 6 Q. B. D. 530.

(2) 6 Q. B. D. 673.

In the present case the house is occupied by the widow, "the caretaker of the premises," her son, who is a clerk in the employ of a firm of merchants carrying on business elsewhere, a daughter, aged nineteen, and a servant. It is said in the case that "the caretaker being a woman it is a condition of her employment that the son shall sleep on the premises for increased safety." I gather this means that the mother stipulated that her son should live in the house while she was caretaker. That is not a condition of things contemplated by the statute, and I do not see how by any ingenuity it can be tortured so as to come within the provisions of either of the sections which I have read. The house therefore is an inhabited house within the Act.

SMITH, J. I am of the same opinion; and I wish to put the other alternative, which is, assuming the son did not go there at the request of the mother, but at the request of the owner of the house, then the owner of the house has two caretakers; he has the mother and the son. The statute says that he is to have only one.

Judgment for the respondent.

Solicitors for appellant: *Wordsworth, Blake, & Co.*
Solicitor for respondent: *The Solicitor of Inland Revenue.*

A. M.

HAWKE *v.* BREAR.

1885
March 26.

Practice—Costs—Arbitration—Reference of Cause and all Matters in difference—Costs of Action and Reference to abide Event—"Event" construed distributively.

An action and all matters in difference were referred, the costs of the cause, reference, and award to abide the event:—

Held, on the authority of *Ellis* v. *Desilva* (6 Q. B. D. 521), that the word "event" must be construed distributively; and that consequently, upon an award by which the arbitrator decided in the plaintiff's favour upon the claim in the action, but in the defendant's favour upon a matter in difference not raised in the action, the plaintiff was entitled to the costs of the action and the defendant to the costs of the matter on which he had succeeded.

Gribble v. *Buchanan* (18 C. B. 691; 26 L. J. (C.P.) 24) not followed.

Appeal by the defendant from an order of Denman, J., at chambers.

The facts were as follows:—The plaintiff had brought an action against the defendant for a sum alleged to be due to the plaintiff from the defendant as incoming tenant in respect of tenant right on two farms let by the plaintiff to the defendant. The defendant in his statement of defence denied liability, but paid into court the sum of 493*l.*, and said that it was sufficient to satisfy the plaintiff's claim.

After issue joined the action and all matters in difference between the parties were referred to the award of an arbitrator by a master's order made by consent. The order of reference provided, inter alia, that the costs of the cause and the costs of the reference and award should abide the event, and that, unless restrained by any order of the Court or a judge, the party or parties, in whose favour the award should be made, should be at liberty within seven days after service of a copy of the award on the solicitor or agent of the other party to sign final judgment in accordance with the award and for all costs that he or they might be entitled to under the order and under the award together with the costs of the said judgment. The defendant set up before the arbitrator various claims against the plaintiff for breaches of stipulations of the agreement for the lease of the farms. The arbitrator awarded that the defendant was indebted to the plaintiff in respect of the causes of action alleged in the statement of claim in the sum of 293*l.* 9*s.* 8*d.* beyond the amount paid into court, which sum he awarded and directed the defendant to pay to the plaintiff, and he awarded that the plaintiff should stub a certain fence situate on the south side of certain fields included in the farms mentioned in the statement of claim, and also restore and sow down the land on which the said fence stood on or before the 1st of January, 1886, and he further adjudged that certain fixtures in a house situate on one of the farms were the property of the plaintiff, and should not be included in the valuation of the tenant's fixtures, and he stated that they were accordingly excluded from his award.

The plaintiff upon the award signed judgment against the defendant for 293*l.* 9*s.* 8*d.* and costs to be taxed. Upon application by the plaintiff to the master to tax the costs, the defendant's solicitor took the objection that the judgment was not warranted by the award, and that under the order of reference and the award the plaintiff was not entitled to costs, the award being partly in favour of the plaintiff and partly in favour of the defendant. The master refused to tax the costs. The plaintiff thereupon applied to Denman, J., at chambers, for an order directing the master to tax the costs, and the learned judge made an order directing that the plaintiff's costs should be taxed upon the judgment, the defendant to be allowed the costs of such matters in difference as he had succeeded on, and the plaintiff to be allowed the general costs of the action.

Houghton, for the defendant. It has been decided that, where the cause and all matters in difference are referred, and the costs of the action and reference are to abide the event, if the award in such a case is partly in favour of one party and partly in favour of the other, there is no "event" within the meaning of the submission and there can be no costs on either side: Russell on Awards, 5th ed., 379, 380; *Gribble* v. *Buchanan* (1); *Reynolds* v. *Harris*. (2) In this case the arbitrator's award was partly in favour of the plaintiff and partly in favour of the defendant. As to the action, no doubt the plaintiff succeeded, but as to a certain matter in difference the defendant succeeded; consequently there was no general event of the award. *Ellis* v. *Desilva* (1) is not in point, for there it did not appear that there were really any matters in difference outside the action, and the decision only is that the arbitrator in dealing with the matters in the action ought to have found the issues distributively.

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(1) 18 C. B. 691; 26 L. J. (C.P.) 24.

(2) 3 C. B. (N.S.) 267; 28 L. J. (C.P.) 26.

Cyril Dodd, for the plaintiff, was not called upon.

MATHEW, J. I think that the order of Denman, J., was correct, and that this appeal must be dismissed. The question depends on the meaning of the order of reference. The position of things when the parties agreed to the terms of that order was as follows: an action had been brought by the plaintiff to recover a considerable sum of money, and the main question between the parties on the pleadings was whether the plaintiff was entitled to recover anything beyond the amount paid into court. The defendant appears to have been claiming damages from the plaintiff for breaches of agreement, in respect of which however he had not counterclaimed in the action, and there were therefore matters in difference between the parties besides the claim in the action. After issue joined the parties agreed to refer, and accordingly an order of reference was made by consent by which the action and all matters in difference were referred to an arbitrator, and the costs of the action, the reference, and the award were to abide the event. The defendant's counsel asks us to say that under these circumstances the parties meant that, if the defendant were successful to the extent of 40*s.* in respect of the matters for which he claimed, the plaintiff was not to be entitled to the costs of the action although he were successful in recovering a large sum of money. I cannot suppose that the parties meant anything so absurd. I think the term "event" in the order of reference must be construed distributively, and that the costs of the action must abide the event of the action, and the costs of the matters in difference must abide the event of the matters in difference. The defendant's counsel relied on the case of *Gribble* v. *Buchanan.* (2) In that case Jervis, C.J., thought it reasonable that

(1) 6 Q. B. D. 521.

(2) 18 C. B. 691; 26 L. J. (C.P.) 24.

the term "event" should be construed as we propose to construe it, but he thought that the practice was against that construction. He therefore adopted a construction which he thought unreasonable because he conceived himself to be bound by authority. I am not surprised to find that a more reasonable course has been since adopted by the Court of Appeal in *Ellis* v. *Desilva* (1), and that the Court there held that in a submission like this now before us the word "event" must be construed distributively.

I think that the decision in that case is an authority which enables us, notwithstanding the cases relied on by the defendant's counsel, to give judgment in favour of the plaintiff.

SMITH, J. I am of the same opinion. In this case, as in *Ellis* v. *Desilva* (1), the cause and all matters in difference were referred, and the costs of the action, reference, and award were to follow the event. It is true that in *Gribble* v. *Buchanan* (2), a case very like the present, Jervis, C.J., said that, though the construction contended for by the plaintiff was reasonable, the practice was the other way. In the case, however, of *Ellis* v. *Desilva* (1) the Court of Appeal seems to have placed the practice on a more reasonable footing.

Appeal dismissed.

Solicitors for plaintiff: *Pitman & Sons, for Brown, Wilkins, & Scott.*

Solicitor for defendant: *Seal, for Rawson, George, & Wade.*

(1) 6 Q. B. D. 521.

(2) 18 C. B. 691; 26 L. J. (C.P.) 24.

E. L.

KNIGHT, Appellant; BOWERS, Respondent.

1885
March 31.

Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Article not of " nature, substance, and quality " demanded.*

The Sale of Food and Drugs Act, 1875, after reciting that it is desirable to amend the law regarding the sale of food and drugs in a pure and genuine condition, provides by s. 6 that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser under a penalty :—

Held, that s. 6 was not limited in its application to sales of adulterated articles, but that it applied also to cases in which the article sold was unadulterated but wholly different from that demanded by the purchaser.

Case stated under 20 & 21 Vict. c. 43, by the stipendiary magistrate of the borough of Stoke-upon-Trent.

The appellant was an inspector, duly appointed under the Sale of Food and Drugs Act, 1875, for one of the divisions of the county of Stafford.

The respondent was a herbalist carrying on business at Longton, in the parish of Stoke-upon-Trent, in the same county.

At a petty session held at Fenton, in the same parish, on the 24th of October, 1884, the respondent was charged before the magistrate upon an information and complaint preferred by the appellant with having, on the 16th of August, 1884, unlawfully sold to the prejudice of Sarah Onions, the purchaser, a certain drug, to wit saffron, which was not of the nature, substance, and quality of the article demanded by such purchaser, contrary to the provisions of the statute in such case made and provided.

On the 16th of August, 1884, Sarah Onions went to the respondent's shop, and then and there requested him to sell her a quantity of saffron. The respondent then delivered to the purchaser a quantity of savin, for which she paid 3*d.* Immediately the purchase was completed, Sarah Onions informed the respondent that she had made the purchase for the purpose of having the article supplied analyzed by the public analyst of the district, and she then divided it into three parts, as required by the Sale of Food and Drugs Act, 1875, and delivered one of such parts to the respondent, and the other two to the appellant, as such inspector, and he delivered one of such parts to the public analyst. At the hearing of the information the public analyst, a doctor of medicine, and a pharmaceutical chemist, were called as witnesses for the appellant. They proved that saffron and savin are both articles included in the British Pharmacopæia, but are wholly dissimilar in colour, size, shape, and appearance, and have diverse medicinal properties; saffron being used mainly in the treatment of measles and as a colouring agent; savin being sometimes improperly used in the preparation of a decoction for procuring abortion. It was admitted that the article supplied by the respondent was in its natural condition, unadulterated, and not admixed or compounded with any other drug, article, or ingredient.

The appellant relied on the fact that savin, the article supplied by the respondent, was not of the nature, substance, and quality of the article demanded by the purchaser, namely saffron.

The respondent contended that, as no adulteration or improper mixture had taken place, the statute did not apply. The magistrate was of opinion that the respondent's contention was correct; that the preamble of the repealed Act of 1872 (35 & 36 Vict. c. 74), and the preamble of the Sale of Food and Drugs Act, 1875, shewed that the only object of the legislature was to prevent the adulteration of articles of food and drugs, and to ensure the selling of them in a pure and genuine condition, and that it was not intended to make it an offence to sell an article pure in itself but not the one demanded. He therefore dismissed the information without calling upon the respondent to give any evidence.

The question for the opinion of the Court was whether the magistrate's decision was right in point of law.

If the Court should be of opinion that his decision was right, the information and complaint were to stand dismissed. If the Court should be of opinion that his decision was wrong, and that the respondent ought to have been called on for his defence on the facts, then the case was to be remitted to the magistrate with the opinion of the Court.

Bosanquet, Q.C., for the appellant. The respondent by supplying savin instead of saffron came within the terms of s. 6 of the Sale of Food and Drugs Act, 1875. (1) He supplied an article not of the nature demanded by the purchaser; and by the Sale of Food and Drugs Act, 1879, s. 2, (2) the words in s. 6 of Act of 1875, "of the nature, substance, and quality" are to be construed disjunctively, so that an offence is committed if the article supplied be defective in any one of those three respects. The enacting words of s. 6 of the Act of 1875 should be followed, and not the preamble, to which, it is submitted, the learned magistrate has given too much effect. The Act was passed for the protection of the poorer classes, who might be unaware of the difference between such drugs as saffron and savin.

The respondent did not appear.

MATHEW, J. I am of opinion that the decision of the magistrate was wrong, and that the case must be sent back to him. He has stated his reasons at the end of the case, and in my opinion he has given much too great an effect to the language of the preamble of the Act of 1875. The preamble recites that "it is desirable that the law regarding the sale of food and drugs in a pure and genuine condition should be amended." That language is not sufficient to indicate that every subsequent section in the Act must be construed so as to apply to adulteration and adulteration only. The terms of s. 6 of the Act of 1875, as interpreted by s. 2 of the later Act of 1879, clearly include the present case. By the later Act the words "of the nature, substance, and quality of the article demanded" must be read as though they were "of the nature *or* substance *or* quality," &c. Here saffron was demanded and the respondent supplied savin, a wholly different article. I think that the legislature intended to protect purchasers from impositions of this kind. Had it been intended to limit the operation of the Act to cases of adulteration only, it would have been easy to say so. One can imagine many instances—as when chicory is supplied instead of coffee, or lard instead of butter—in which the object of the legislature would not be attained if the magistrate's view of the construction of this Act were right.

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(1) The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), is entitled "An Act to repeal the Adulteration of Food Acts, and to make better Provision for the Sale of Food and Drugs in a pure state:" and the preamble recites that "it is desirable that the Acts now in force relating to the adulteration of food should be repealed, and that the law regarding the sale of food and drugs in a pure and genuine condition should be amended."

By s. 6, "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding £20."

(2) By the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 2, "in any prosecution under the provisions of the principal Act for selling to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, it shall be no defence . . . . to prove that the article of food or drug in question, though defective in nature or in substance or in quality was not defective in all three respects."

SMITH, J. I am of opinion that the construction of s. 6 of the Sale of Food and Drugs Act, 1875, contended for by the appellant's counsel must be adopted, though I doubt whether the legislature intended to cover a case like this, where for anything that appears on the case, the respondent may have honestly supplied savin instead of saffron, the article demanded by the purchaser. The preamble of the Act states that it is desirable that the law regarding the sale of food and drugs "in a pure and genuine condition"—i.e., not adulterated—should be amended. Then the Act goes on to describe the offences aimed at. Sect. 3 prohibits the mixing of ingredients injurious to health with food. Sect. 4 prohibits the mixing of drugs with injurious ingredients. Sect. 5 enacts that no person shall be liable to be convicted under the two preceding sections if he did not know, and could not with reasonable diligence have ascertained, that the article of food or drug sold by him was mixed with such injurious ingredients. Then comes s. 6, which, read with s. 2 of the subsequent Act, provides that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, *or* substance, *or* quality of article demanded by such purchaser. The question here is, did the respondent sell a drug which was not of the nature of the article demanded by the purchaser? It is clear that he did. I cannot escape from the terms of s. 6; and, though I doubt whether the legislature meant to include the case of a man selling an article pure and unadulterated, but other than the article demanded by the purchaser, I can only say that they have included that case.

Case remitted.

Solicitors for appellant: *Thomas White & Sons.*

W. A.

LIGHTBOUND, APPELLANT; THE HIGHER BEBINGTON LOCAL BOARD, RESPONDENTS.

1885
March 31.

Local Government Acts—Streets—Apportionment of Expenses—Premises "fronting, adjoining, or abutting"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

The appellant owned premises separated from a street by a wall five feet high, belonging, together with the land on which it stood, to another person. The appellant had no direct access from his premises to the street, but in order to reach it had to pass for a short distance down a public footpath, or over other intervening land:—

Held, that the appellant was not the owner of premises "fronting, adjoining, or abutting" on the street within the meaning of s. 150 of the Public Health Act, 1875, and therefore was not liable to contribute to the expenses of sewering and paving the street under that section.

CASE stated at quarter sessions by justices of the county of Chester.

The respondents, who are the urban authority of the district of Higher Bebington, having incurred expenses in sewering, paving, and channelling a street called "School Lane" within their district, charged a sum of 58*l.* on the appellant, under s. 150 of the Public Health Act, 1875, as his proportion of the expenses so incurred, in respect of his being the owner of certain land and cottages alleged to front, adjoin, or abut on School Lane. Upon a summons taken out by the respondents, justices at petty sessions ordered the appellant to pay this sum; and on appeal to quarter sessions the court confirmed the order subject to this case. The material facts stated in the case, and appearing from the plan which was made part of it, were as follows:—

The appellant's property, in respect of which the expenses were charged, consisted of two plots of land with some cottages thereon. The plots were divided from School Lane by a wall five feet high. This wall and the land upon which it stood belonged to one Major Orred. The plots were separated by an ancient public footpath running into School Lane through an opening in the wall, and no access could be had to School Lane from the appellant's land without either entering upon this footpath and proceeding along it into School Lane, or going round the end of the wall. The paving and channelling done by the respondents, for part of which the present claim was made, extended to the end of the wall but no further.

It was contended for the appellant that upon the facts stated in the case his property did not front, adjoin, or abut on School Lane within the meaning of s. 150 of the Public Health Act, 1875. It was contended for the respondents that his property did so front, adjoin, or abut.

If the Court should be of opinion that the contention of the appellant was right, then judgment was to be entered for him; but if the Court should be of opinion that the contention of the respondents was right, then judgment was to be entered for them.

Bigham, Q.C. (*F. Marshall* with him), for the appellant. The appellant's land does not front, adjoin, or abut upon School Lane within the meaning of s. 150 of the Public Health Act, 1875. It is clear that the strip of land on which the wall stands does front, adjoin, or abut upon the lane: *Williams* v. *Wandsworth Board of Works.* (1) There cannot be two owners severally liable to these expenses in respect of the same length of frontage. *Baddeley* v. *Gingell* (2), *London School Board* v. *St. Mary, Islington* (3), and *Wakefield Local Board* v. *Lee* (4), are distinguishable, because in those cases there was direct access from the premises in question to the street.

[He also referred to *Newport Urban Sanitary Authority* v. *Graham.* (5)]

Henn Collins, Q.C. (*C. Higgins* with him), for the respondents. In passing the Public Health Act, 1875, the legislature did not intend to narrow rateability in respect of these expenses, nor to alter the principles laid down by the earlier decisions, which establish that if there is benefit, or possibility of benefit, from the proximity of the premises to the street, and access from them to the street, the owner is liable; that absolute contiguity is not necessary, but a rateable hereditament may intervene between the premises and the street: *Baddeley* v. *Gingell* (1); *London School Board* v. *St. Mary, Islington* (2); *Wakefield Local Board* v. *Lee.* (3) It is submitted that, where houses front upon a street though other land intervenes, the owners, both of the houses and the intervening land, would be liable under s. 150. The appellant must be taken to be owner of the soil which runs between the two plots of land into School Lane. He has land, therefore, abutting upon School Lane in respect of such ownership. The owner of the inconsiderable strip of land upon which the wall stands gains no benefit from its proximity to the street; whilst the appellant, having complete access from his land to School Lane by passing down the public footpath, gains great benefit.

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(1) 13 Q. B. D. 211.

(2) 1 Ex. 319.

(3) 1 Q. B. D. 65.

(4) 1 Ex. D. 336.

(5) 9 Q. B. D. 183.

Bigham, Q.C., replied.

Mathew, J. I am of opinion that our judgment should be for the appellant. I have had considerable doubt as to the proper construction of the statute. Speaking for myself, I entertain no doubt that this wall was built and maintained for the purpose of preventing the owners of the cottages from having frontage to School Lane. Having regard to the means of access to School Lane from those cottages, I think that the owner of the wall has a valuable property in respect of which he is liable to contribute his proportion of the expenses in question here. The owners of the cottages have some means of access to School Lane, but to get there they must go over the land of Major Orred, because he has retained the absolute ownership of the intervening strip of land upon which the wall stands. Looking at the terms of the statute I think that the appellant's property cannot be said to front, adjoin, or abut upon School Lane. It was urged for the appellant that these words mean the same thing, and imply in every case absolute contiguity with the street of the land sought to be charged. I am not satisfied that that contention is well founded. The cases shew, and particularly the case of *Wakefield Local Board* v. *Lee* (3) shews, that absolute contiguity with the street is not necessary in order to impose liability upon owners in respect of these expenses. If the cottages had any direct access to the street, I am not prepared to say that the case would not come within the provisions of s. 150. But cases were cited in argument which shew that the existence of a wall like the wall in the present case may make all the difference. In *Newport Urban Sanitary Authority* v. *Graham* (1) it was pointed out by Cave, J., that if the wall which separated the owner's premises from the street had not belonged to him, or if a strip of land had intervened, his premises would not have adjoined or abutted upon the street. There is also the decision in *Williams* v. *Wandsworth Board of Works* (2), which is very nearly in point. In that case the Court held, under circumstances very similar to these, that the owner of a strip of land four inches wide, upon which was erected a boundary fence, was liable to contribute to expenses similar to those in question here, as being the owner of land abutting upon a new street. I am on the whole of opinion, upon the authority of the cases and dicta, that the appellant's land did not front, adjoin, or abut upon School Lane within the meaning of s. 150 of the Public Health Act, 1875.

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(1) 1 Ex. 319.

(2) 1 Q. B. D. 65.

(3) 1 Ex. D. 336.

SMITH, J. The question we have to decide is whether upon the facts stated in the case the appellant is or is not owner of premises "fronting, adjoining, or abutting" upon School Lane. By s. 150 of the Public Health Act, 1875, the urban authority may give notice to the owners or occupiers of premises fronting, adjoining, or abutting upon a street, requiring them to do the repairs specified in that section: if the owners or occupiers do not think fit to do those repairs themselves the urban authority may do them, and recover the expenses incurred in so doing from the owners in default "according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority," &c. Therefore the total amount of the expenses incurred by the urban authority in respect of sewering and paving the street must be apportioned amongst the owners of premises fronting, adjoining, or abutting upon the street according to the frontage of each owner. No question of the value of the premises enters into the matter. It seems to me patent that in the present case Major Orred is the owner of the premises which front, adjoin, or abut on School Lane, because he has land which fronts School Lane, extending throughout the whole length of that lane on the eastern side. I cannot follow the argument that his land does not front, adjoin, or abut on the street because it is so very narrow a strip. The dimensions in my view are immaterial in determining whose is the land which does front, adjoin, or abut on the street. If my construction of the statute be correct, how can there be two owners whose land fronts, adjoins, or abuts on the street? How can it be said that the land lying behind Major Orred's land fronts, adjoins, or abuts upon School Lane, if his land does? If Major Orred was called upon to pay these expenses he would have no answer to the claim, and it seems to me impossible that the appellant should also be liable in respect of the same expenses. *Williams* v. *Wandsworth Board of Works* (1) supports this view. It is clear to my mind that Major Orred kept the wall in his own hands for the express purpose of preventing the appellant from getting direct access from his premises to School Lane. He cannot get such access except by purchase from Major Orred. It was argued that the appellant's premises front School Lane because he must be taken to be the owner ad medium filum of the public footpath which runs into School Lane between the two plots. But the judgment of Lord Watson in *Great Eastern Ry. Co.* v. *Hackney Board of Works* (2) disposes of that argument, and shews clearly that the owner of the soil in a public road is not an owner of land for the purpose of being made liable to pay expenses similar to those in question here. All the authorities cited for the respondents are distinguishable from this case. In *Baddeley* v. *Gingell* (3) the Act of Parliament imposed the liability to be rated in respect of the expenses of paving any street upon the owners of houses "within the said street;" and it was held that a house with direct and private access to a street was within the meaning of the Act. In *London School Board* v. *St. Mary, Islington* (4), the liability was imposed by s. 105 of 18 & 19 Vict. c. 120, upon the owners of houses "forming the street." The school-house in question stood back about seventy feet from the street, but had direct and private access to it. The Queen's Bench Division held that the school-house formed part of the street within the terms of s. 105. In *Wakefield Local Board* v. *Lee* (1) the premises were divided from the street by a small stream with access to the street by means of two bridges. The Court held that the premises fronted, adjoined, or abutted upon the street within s. 69 of the Public Health Act, 1848. But it was expressly pointed out in the judgment of the majority of the Court that no dry land intervened between the premises and the street, and also that the bridges were under the control of the owners of these premises, and only useful to them. Here there is intervening land, and there is no direct access to the street. It was said in argument that there was access to the street by walking down the public footpath between the appellant's two plots of land, and that it was a matter of degree and distance in each case whether the access was such as to bring the premises within the terms of s. 150 of the Public Health Act, 1875. But it is, I think, impossible to say that premises front, adjoin, or abut upon a street within s. 150, because access to the street can be had by walking down a public footpath. For these reasons I am of opinion that the appellant is entitled to judgment.

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(1) 9 Q. B. D. 183.

(2) 13 Q. B. D. 211.

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(1) 13 Q. B. D. 211.
(2) 8 App. Cas. 687.
(3) 1 Ex. 319.
(4) 1 Q. B. D. 65.

Judgment for the appellant.

Solicitors for appellant: *Chester, Mayhew, Broome, & Griffithes, for Walter Weld, Liverpool.*

Solicitors for respondents: *Tyrer, Kenion, Tyrer, & Simpson, Liverpool.*

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(1) 1 Ex. D. 336.

W. A.

[IN THE COURT OF APPEAL.]

1885
April 1.

CHADWICK *v.* BALL.

Prohibition—Inferior Court—Jurisdiction—Salford Hundred Court of Record Act, 1868 (31 & 32 *Vict. c. cxxx.*), s. 7.

Sect. 7 of the Salford Hundred Court of Record Act, 1868, enacts that "no defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and, if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes":—

Held, that the defendant, against whom judgment had been recovered in the Salford Hundred Court, he not having pleaded to the jurisdiction, could not have a writ of prohibition on the ground of want of jurisdiction, inasmuch as the above-mentioned section under the circumstances conferred jurisdiction on the Salford Hundred Court.

Oram v. *Brearey* (2 Ex. D. 346) overruled.

Appeal by the plaintiff from the judgment of the Divisional Court affirming the order of Wills, J., at chambers giving the defendant leave to issue a writ of prohibition.

The facts were as follows: the action, the further proceedings in which it was sought to prohibit, was brought in the Salford Hundred Court. It was stated in the affidavits filed on behalf of the defendant that by Order in Council of the 31st of December, 1878, made under the County Courts Act, 1852 (15 & 16 Vict. c. 54), s. 7, it was ordered that from the 1st of January, 1879, the whole of the municipal borough of Oldham should be excluded from the jurisdiction of the Salford Hundred Court, and the said Court should cease to exercise any jurisdiction within the limits of the said borough in all cases whereof the county court hath cognizance. It was further stated that at the time of the accruing of the alleged cause of action (a claim of 12*l*. 4*s*. 6*d*. for commission) and of the issuing of the writ the defendant's residence and place of business were and ever since had been situate within the municipal borough of Oldham, and the County Court of Lancashire held at Oldham had cognizance of and jurisdiction over the alleged cause of action. The defendant did not in his statement of defence raise the question of the jurisdiction of the Salford Hundred Court. The action proceeded to trial, and the plaintiff obtained a verdict and judgment for the amount claimed.

The defendant then applied for and obtained the order for the writ of prohibition. (1)

Ambrose, Q.C., and *Woodard*, for the plaintiff. The language of the 7th section of the Salford Hundred Court Act is wider than that of s. 15 of the Mayor's Court Procedure Act (20 & 21 Vict. c. clvii.), the effect of which was held to be merely to prevent the defendant from taking objection to the jurisdiction within the Mayor's Court itself otherwise than by plea: *Jacobs* v. *Brett.* (2) Sect. 7 of the Salford Hundred Court Act actually gives jurisdiction when the defendant does not plead specially to the jurisdiction. *Oram* v. *Brearey* (3) was wrongly decided.

Henn Collins, Q.C., and *Agabeg*, for the defendant. *Oram* v. *Brearey* (3) was rightly decided, and is directly in point. The language of the Salford Hundred Court Act, s. 7, like that of the Mayor's Court Act, s. 15, ought not to be construed as intended to oust the jurisdiction of the superior Court to prohibit the inferior Court where there is an excess of jurisdiction, and full effect may be given to it by treating it as applying only to the proceedings in the local court itself.

The words of the 15th section of the Mayor's Court Procedure Act are quite as strong as those of the Salford Hundred Court Act, for there it is provided that no defendant shall be permitted to object to the jurisdiction by any proceeding whatsoever except by plea, which would include proceedings in prohibition.

[There were cited in addition to the above authorities: *Mayor of London* v. *Cox* (4); *Manning* v. *Farquharson* (5); *Bridge* v. *Branch* (6); *Baker* v. *Clark* (7); *Worthington* v. *Jeffries.* (8)]

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(1) The facts, arguments, and enactments with regard to the question whether the Salford Hundred Court had jurisdiction apart from the effect of s. 7 of the Salford Hundred Court Act are not set out, because, as will be seen, it became immaterial to decide the point.

By the Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), s. 7, it is provided, "No defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and if the want of jurisdiction be not so pleaded the Court shall have jurisdiction for all purposes."

(2) Law Rep. 20 Eq. 1.

(3) 2 Ex. D. 346.

(4) Law Rep. 2 H. L. 239.

(5) 30 L. J. (Q.B.) 22.

(6) 1 C. P. D. 633.

(7) Law Rep. 8 C. P. 121.

(8) Law Rep. 10 C. P. 379.

BAGGALLAY, L.J. In my opinion this case is entirely governed by the 7th section of the Salford Hundred Court of Record Act, 1868, and I express no opinion as to the effect of the provisions of the Mayor's Court Act that have been cited. There is, as it seems to me, a marked distinction between the language of the two Acts. The Salford Hundred Court Act was passed after the decision in *Cox* v. *Mayor of London.* (1) The general effect of that decision was that the garnishee in the Mayor's Court was at liberty to proceed in prohibition without putting in a plea to the jurisdiction, whatever might be the case with regard to the defendant. At that time there was a provision in force with regard to the Mayor's Court providing that the defendant should not be permitted to object to the jurisdiction except by plea, being identical in effect with the provision of the first part of the 7th section of the Salford Hundred Court Act. But a further special provision is introduced into the 7th section of the Salford Act, and additional words are added on which I think this case depends. I cannot think that these latter words were intended merely to have the same effect as the earlier words. We must, I think, according to the established principles of construction, attribute some further meaning to them. They are as follows: "and if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes." There is no distinction there drawn between a stranger and a party to the suit, with regard to the right to proceed by way of prohibition. The section says that the Court shall have jurisdiction for all purposes. That being so, has not the omission to plead to the jurisdiction conferred jurisdiction on the Salford Hundred Court in this case for all purposes? It appears to me that it has, and the result is that the defendant, who has taken his chance of success in the inferior court, cannot, when the judgment is against him, turn round and apply for a prohibition.

Mr. Henn Collins has called our attention to the case of *Oram* v. *Brearey* (2), where he had to contend to the contrary of his present contention. I have given my best attention to the judgment in that case, but I cannot concur in it. I think the argument of Mr. Henn Collins in that case ought to have prevailed, and that his present argument ought not to prevail. For these reasons I think the decision of the Court below must be reversed. Sir James Hannen, who heard part of the argument, was prepared to concur in the opinion I have expressed.

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(1) Law Rep. 2 H. L. 239.

(2) 2 Ex. D. 346.

LINDLEY, L.J. I am of the same opinion. The question is whether the defendant in this case, who was sued in the Salford Hundred Court and took his chance of success in that court, can now, at the eleventh hour, obtain a prohibition. I do not know that upon the authorities it can be said to be absolutely settled that in the case of the Mayor's Court the defendant could, under such circumstances as these, obtain a prohibition, though expressions were used in *Worthington* v. *Jeffries* (1) which certainly seem to go that length. However, it is not necessary to decide that question, for I think the decision in this case may be placed on safer ground, viz., upon the words at the end of the 7th section of the Salford Hundred Court Act. But for those words the section would have been identical with the 15th section of the Mayor's Court Act, but this section goes on to say that "if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes." I think we must give some effect to those words beyond the effect given to the preceding words in the first part of the section. The language is peculiar; it does not say that the defendant shall not take advantage of the want of jurisdiction in arrest of judgment, or on a plea of the general issue, or otherwise; such matters are already provided for by the first part of the section. It says that the Court shall have jurisdiction for all purposes. These words seem to me entirely to meet the observations of Pollock, B., in *Oram* v. *Brearey* (2), where he says that the jurisdiction of the superior Court is not to be ousted except by express provision. This enactment does not touch the question of the jurisdiction of the superior Court to prohibit where there is no jurisdiction in the inferior Court, because these words extend the jurisdiction of the inferior Court. This provision is, after all, very just and reasonable: the substance of it is that the defendant shall not be allowed first to take his chance in the inferior Court and then, after so doing, to turn round and object to the jurisdiction. But, however that may be, the effect of the words appears to me to be clear.

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(1) Law Rep. 10 C. P. 379.

(2) 2 Ex. D. 346.

Decision reversed.

Solicitor for plaintiff: *J. E. Lambert, for W. Harris.*
Solicitors for defendant: *Johnson & Weatherall, for Clegg.*

E. L.

[IN THE COURT OF APPEAL.]

April 17.

CARSON *v.* PICKERSGILL & SONS.

Practice—Action in formâ pauperis—Taxation of Plaintiff's Costs—Remuneration for Solicitor and Fees for Counsel—Rules of Supreme Court, 1883, *Order XVI., rr.* 24, 25, 26, 27, 31.

Under the Rules of the Supreme Court, 1883, Order XVI., rr. 24, 25, 26, 27, 31, a successful plaintiff in an action in formâ pauperis tried before a judge and jury is entitled upon taxation as against the defendant to costs out of pocket only, and cannot be allowed anything for remuneration to his solicitor or fees to counsel.

APPEAL from an order of Chitty, J., refusing to review the master's taxation of the plaintiff's costs.

It appeared that after the commencement of the action the plaintiff obtained an order for leave to sue in formâ pauperis. At the trial before Mathew, J., and a jury, at Durham Assizes, in July, 1884, the plaintiff had a verdict for 50*l*. The learned judge gave judgment for the amount, and, on application for costs, said that he would allow the plaintiff any benefit to which he might be entitled as a pauper plaintiff.

The master upon taxation merely allowed the plaintiff his costs upon the pauper scale, i.e., costs out of pocket, and of witnesses, but no remuneration or fees for services rendered.

March 2. *J. L. Walton*, for the plaintiff. The plaintiff is entitled to the same costs as if he were an ordinary litigant. The defendants will rely upon Order XVI., rr. 26, 27, &c. (1) as

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(1) Order XVI., rule 22: "Any person may be admitted in the manner heretofore accustomed to sue or defend as a pauper on proof that he is not worth 25*l*., his wearing apparel and the subject-matter of the cause or matter only excepted."

Rule 24: "No person shall be

shewing that no fees can be due from a pauper plaintiff, and that consequently he is not entitled to tax them against the defendants. But the rules are for the benefit of pauper suitors, and if the pauper succeeds in his action it is reasonable that the defendants should pay the legal expenses which have been caused by the defence. Rule 31, is not a new provision, it is practically in the same form as the old Consolidated Order of the Court of Chancery,—Order XL., r. 5,—which directed that where costs are ordered to be paid to a party suing in formâ pauperis, "such costs shall be taxed as dives costs unless the Court shall otherwise direct." In the new rule the word "dives" is dropped and the words "costs as in other cases" are substituted, and it must be taken to mean that they are to be taxed as if the plaintiff had not been a pauper. At common law actions in formâ pauperis were first regulated by 11 Hen. 7, c. 12. This statute, like the new rules, enacted that the pauper should not be liable for fees or costs. The Court of Chancery adopted a practice in accordance with the statute. But in *Scatchmer* v. *Foulkard* (1), Lord Somers held that a pauper defendant was entitled to "dives" costs on the ground that the counsel and solicitor gave their services to the pauper and not to his adversary. *Wallop* v. *Warburton* (2) was to the same effect, and in *Rattray* v. *George* (3)

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permitted to sue as a pauper unless the case laid before counsel for his opinion, and his opinion thereon, &c., shall be produced before the Court or judge, or proper officer to whom the application is made, and no fees shall be payable by a pauper to his counsel or solicitor."

Rule 25: "A person admitted to sue or defend as a pauper shall not be liable to any court fee."

Rule 26: "Where a person is admitted to sue or defend as a pauper, the Court or a judge may, if necessary, assign a counsel or solicitor, or both, to assist him, and a counsel or solicitor so assigned shall not be at liberty to refuse his assistance unless he satisfies the Court or judge of some good reason for refusing."

Rule 27: "Whilst a person sues or defends as a pauper no person shall take or agree to take, or seek to obtain from him any fee, profit, or reward, for the conduct of his business in the Court, and any person who takes, or agrees to take, or seeks to obtain any such fee, profit, or reward shall be guilty of a contempt of Court."

Rule 31: "Costs ordered to be paid to a person admitted to sue or defend as a pauper shall, unless the Court otherwise directs, be taxed as in other cases."

(1) 1 Eq. Ab. 125.

(2) 2 Cox, Ch. Ca. 409.

(3) 16 Ves. 232.

Lord Eldon held that the Court had a discretion to allow the pauper "dives" costs. This practice continued until the date of the Consolidated Orders. Order VII., r. 9 (1661), provides that no fee, profit, or reward shall be taken of the pauper by any counsel or solicitor, for the despatch of the pauper's business." Order XL., r. 5 (1849), as before stated, provides that costs ordered to be paid to a pauper plaintiff shall be taxed as "dives" costs unless the Court shall otherwise direct. It is clear therefore that in Chancery costs were allowed the pauper as against a defendant, although the pauper was not liable for costs to his own solicitor.

At common law costs were allowed the pauper on the ground that the provision in the statute of Henry 7, preventing him from being liable to costs, only continued so long as he was a pauper, but the moment he recovered a verdict for a sum above 5*l.* he was dispaupered. It is true that this practice was disapproved of by the Queen's Bench in *Dooly* v. *Great Northern Railway Co.* (1), and by the Practice Rules of Hilary Term, 1853, r. 121, no fees shall be payable by a pauper to his counsel and attorney by reason of a verdict being found for such pauper exceeding 5*l.* But whatever may be the construction of this last rule, and whatever may have been the former practice at common law, it must be remembered that the Act 11 Hen. 7, c. 12, is repealed by the Statute Law Revision Act, 1883, and that the Practice Rules of 1853 are expressly annulled by the new rules. This being the case, Order XVI., r. 31, which applies to both divisions, must be construed with reference to the former Chancery practice, and will then appear to mean that the Court, as before, is to have a discretion as to allowing costs in pauper actions, but that the principle of taxation is to be the same as in other cases. [He referred to Blackst. Comm. (ed. 1825) vol. iii. p. 400; Daniell's Ch. Pr. 6th ed. 84, 90; Beames on Costs, p. 112.]

Herbert Manisty, for the defendants. The plaintiff is not entitled to the costs in question. Under Order XVI., rr. 24, 25, he was never liable to pay remuneration to his solicitor nor fees to his counsel, and he cannot be allowed such costs as against the defendants. It is almost admitted that the repealed rule 121, of

(1) 4 E. & B. 341.

the Rules of Hilary Term, 1853, was intended to prevent the plaintiff from being allowed such costs, but there is no substantial difference between the concluding provision in rule 121, and that in the new rule 24. The test of the plaintiff's right to recover costs from the defendants is a legal liability to pay costs to his own solicitor. *Dooly* v. *Great Northern Ry. Co.* (1) must still be considered as a binding authority, for it was upon the construction of the statute of Henry 7, which so far as it prohibits the recovery of fees from a pauper is in the same terms as the existing rules. As regards rule 31, of Order XVI., it assumes that an order has been made for the payment of costs to the plaintiff, but where, as here, the action is tried by a judge and jury, costs according to Order LXV., r. 1, follow the event and there is no order for costs. Under the Statute of Gloucester (6 Edw. 1, c. 1), a suitor can only be allowed as costs that which he has expended, but here the plaintiff is endeavouring to place himself in a better position than that of an ordinary litigant, and to recover costs which he has neither paid nor is liable to pay.

GROVE, J. The argument for the plaintiff has not satisfied me that the old law and practice as to suing in formâ pauperis can control the operation of Order XVI., rr. 24 to 27. The principal rule, rule 27, is almost like a return to the old law contained in 11 Hen. 7, c. 12, which enacted that every poor person having cause of action should have by the discretion of the Lord Chancellor writs original and writs of subpœna free of charge, and that counsel and attorneys should be appointed for them by the judges without any fee or reward. It almost necessarily followed from this enactment that pauper actions multiplied, and the Act was modified by 23 Hen. 8, c. 15, by which pauper plaintiffs were not liable to pay the defendant's costs but were to suffer punishment at the discretion of the judges. It is stated in Gray on Costs, p. 255, that this punishment was not in practice inflicted, and in order further to check speculative actions the rule of Hilary Term, 1853, declared that a person admitted to sue in formâ pauperis should not be entitled to costs from the opposite party without a judge's order. These provisions applied

(1) 4 E. & B. 341.

only to actions at law, but the same principle was adopted by the Court of Chancery, as appears from *Rattray* v. *George* (1), subject to modifications contained in different Consolidated Orders of the Court of Chancery, and the plaintiff's argument is that we are to be guided, in interpreting the new rules under the Judicature Acts, by the construction put upon Chancery orders which are expressed in different terms, instead of looking at these rules as though we were reading them for the first time. We may no doubt consider the construction put upon rules in pari materiâ, but here the new rules and the old Consolidated Orders are expressed in widely different language. In *Rice* v. *Brown* (2), a decision on the Chancery practice, it is suggested that a pauper may recover costs for the defaults of his opponents, although he is himself not liable to pay them. But it is unnecessary to go into the history of the different modifications of the practice of the Court of Chancery, we must consider what is the proper meaning of the rules themselves. I take it that their object was to prevent the pauper from recovering legal expenses which he was not under the obligation of paying. By rule 24, no fee is to be payable by a pauper plaintiff to his counsel or solicitor. By rule 25, the pauper is not liable to court fees, and by rule 26, the Court may assign a counsel or solicitor to him who shall not be at liberty without good reason to refuse his assistance. Now if a solicitor were certain of recovering costs if the pauper succeeded, there would be no need of the provision as to his receiving no fee for his services. What a strange construction of this rule it would be to hold it to mean that he could recover no costs unless the plaintiff succeeded, but that directly the plaintiff had a verdict the case was altered. The more rational construction is that so long as the person for whom the solicitor is acting is proceeding as a pauper no fee can be recovered from him. If a counsel had a fee marked on his brief, he would come within the prohibition and the words "agreeing to take" a fee in rule 27, and unless a fee was marked and paid by the pauper, it would not under the existing practice as to taxation of costs be taxed as against the defendant.

The only other question is as to the meaning of the words in rule 31, that costs ordered to be paid to a person admitted to sue as a pauper shall be "taxed as in other cases," and it is argued that this means in all respects as if he were not a pauper. But I understand these words to mean that the taxation is to be conducted in the usual manner, but that they do not override the rule preventing a solicitor from recovering fees from a pauper. The rule applies to the mode of taxation, but does not affect the defendant's liability to costs. Costs to which the prohibition in the rules does not apply, such as payments to witnesses and other costs out of pocket, are to be taxed in the same way as costs are taxed in ordinary cases.

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(1) 16 Ves. 232.

(2) 1 B. & P. 39.

The order must be affirmed.

Manisty, J. I am of the same opinion. One principal object of the new rules is that there shall be one settled practice in all three divisions, and I think we are not entitled to depart from their ordinary meaning by considering the previous history of the practice as to costs in formâ pauperis. All we can say is that the tendency of late has been to increase rather than to diminish the precautions in favour of defendants. One of the objects of these new rules is the protection of persons who are sued by paupers, who may of course be subjected to serious inconvenience. In considering the rules which have been made holding the pauper free from all liability to costs, we must remember that it would be a grievous hardship if defendants were so situated that if they succeeded in the action they could recover no costs from the plaintiff, but if they failed they were liable to pay his costs. Then what do we find in the rules? They enlarge the class of persons entitled to bring pauper actions, but at the same time they increase the precautions against any abuse of the privilege. There is a distinct prohibition against the recovery of any costs or fees from the pauper, and the plaintiff was obliged to argue that although this might prevent a brief from being delivered to counsel with a fee marked upon it, yet that a brief might be delivered and a fee marked after the case had been determined. I think that if this were possible the prohibition would be nugatory.

The costs must be taxed on the scale adopted by the master, and I see no objection to the master first intimating what in his opinion is a fair allowance for the payment of witnesses and then adjourning the taxation for the production of vouchers for such payments.

Order affirmed.

The plaintiff appealed.

April 15, 16. *J. L. Walton*, for the plaintiff.

Herbert Manisty, for the defendants.

The same arguments were urged as in the court below.

Cur. adv. vult.

April 17. The following judgments were delivered:—

BRETT, M.R. In this case the plaintiff brought an action in the Queen's Bench Division and obtained an order to proceed in formâ pauperis. The case went to trial, was heard before a judge and jury, and the plaintiff had a verdict in his favour. He then carried in his bill of costs for taxation. Upon the taxation certain costs were allowed him, but he contended that the bill should be taxed on a principle which would allow him costs, not which he had actually incurred, but costs which he would have incurred if he had not sued in formâ pauperis. The defendants contended that they were not liable to these costs, and a question has arisen upon the construction of the Rule of Court, which is of rather an abstruse character, and though I have made inquiries as to costs in formâ pauperis in various quarters I have been unable to find anyone who has much knowledge of the subject. When a person is allowed to sue in formâ pauperis the Court assigns him counsel, who are bound to render him assistance without the usual honorarium, and what is more, the counsel are prohibited from taking, or agreeing to take, any fee from him. The Court also assigns him a solicitor, who is also not at liberty to refuse his assistance, so that he cannot be said to be retained by the party, and the Court appoints him upon the same conditions as counsel, without any power to take remuneration from his client.

Now with regard to the history of costs in formâ pauperis, the practice in the courts of common law was regulated by the statute 11 Hen. 7, c. 12, and a practice which grew up subsequently to that statute. The practice was that if the plaintiff (the suitor in formâ pauperis is generally the plaintiff, and it is more convenient to speak of him as the plaintiff) succeeded he was allowed to pay counsel and a solicitor, just as if he had been originally liable. This rule of practice prevailed until it was considered by the judges of the Queen's Bench in *Dooly* v. *Great Northern Ry. Co.* (1), and those learned judges for the first time said that the practice was, as it were, in the teeth of the statute, and also contrary to the General Rule of Hilary Term, 1853, 121. They also pointed out that it was contrary to ethical rules of right and wrong.—That where the plaintiff succeeded the defendant was bound to pay the reasonable costs which the defendant had paid or made himself liable to pay in consequence of the defence.—But in a case like the present the pauper plaintiff was not liable to pay costs to his solicitor, no rule had made him liable to pay them, and the judges pointed out that by the practice which had prevailed the plaintiff was allowed to make a gift out of his pocket to his solicitor at the expense of the defendant. Therefore the judges declared that the practice was wrong, and they restored it to what it ought to have been. So much for the common law practice. In the Courts of Chancery the history of the practice was different. The statute of Hen. 7 and the General Rule of 1853 did not apply to these Courts, and they were left free to introduce a practice of their own. Whether it originated with Lord Eldon or not I do not know, but the Courts came to the conclusion that if the defendant in a pauper suit was cast he would gain something unless he were compelled to pay the plaintiff the costs which he would have incurred if he were not a pauper. Therefore they allowed the plaintiff after he had succeeded and the suit was terminated to pay fees to his counsel and to his solicitor which would have been due to them if they had been employed by an ordinary suitor, and these they called "dives costs." The term "dives costs" is a strange one. It is not easy to understand what it means. We have consulted our brethren in the Chancery Division, and the most experienced master in that division, and find that it is not clear what these costs are. As far as I understand, "dives costs" were not allowed unless vouchers for the plaintiff's payments were produced. So that the first thing to be done was to mark counsel's fees and pay them. The result of this would be that fees, probably not illiberal, would be paid after the determination of the suit. Then with regard to the solicitor's costs, he would be paid in the same way as if he had been originally retained for reward. It is impossible in my opinion to deal with the case without saying that though the Court of Chancery did not act contrary to the statute of Henry 7, for it was not bound by that statute, it did act contrary to the rules of right and wrong, and we have to consider what was most probably intended by those who had recently to frame a rule on the subject. I think it most likely that they would adopt a rule which is ethically right, which the practice on this subject was certainly not. The Chancery Courts had said that a defendant ought not to gain by a rule made for the benefit of a pauper plaintiff. But it must be remembered that if the pauper fails in his action the defendant can recover nothing from him, and even if the plaintiff succeeds the action may have been defended under good advice, and yet under the Chancery practice the defendant paid costs if he failed, and if he succeeded got nothing. I can see no justice in this, and the argument in favour of the practice appears to me fallacious.

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(1) 4 E. & B. 341.

We come, therefore, to the consideration of the rules themselves. It is necessary before considering Order XVI., r. 31, to look at the terms of the Consolidated Orders in Chancery. In the Consolidated Orders, Order XL., r. 5, it is provided that if the plaintiff succeeds he is to be allowed "dives costs." Now Order XVI., r. 27, of the existing rules provides that whilst a person sues or defends as a pauper no person shall take, or agree to take, or seek to obtain from him, any fee, profit, or reward for the conduct of his business in the court, and that any person who acts contrary to the rule shall be guilty of a contempt of Court. It was argued that this rule was only applicable during the currency of the cause, and that whenever the cause was finished the rule could no longer apply. But I think this construction impossible. The rule applies "whilst a person sues or defends as a pauper," meaning, that if the plaintiff from any cause, such as from having money left to him, is no longer in the position of a pauper, and takes any further step in the proceedings, he shall be in the position of an ordinary litigant. The rule prevents a solicitor from taking any remuneration from his client while he is a pauper, and it supersedes the Consolidated Order, which says that "dives costs" may be awarded. On the other hand, rule 31, says that costs ordered to be paid to a person admitted to sue or defend as a pauper, shall be taxed "as in other cases." The rule drops the term "dives costs," which has no longer any meaning. How are we to construe the words "costs ordered to be paid to a person admitted to sue or defend as a pauper, shall be taxed as in other cases"? The rule obviously contemplates that the pauper shall have some costs. What costs are meant? Where a case is tried by a judge and a jury the rule has no application, for the costs follow the event without any order. But where there is no jury the costs are in the discretion of the Court; and in the Chancery Division it is always the practice to make an order as to the costs. There are, therefore, two classes of cases in which an order is made as to costs, and one in which no order is made. Now the rule of taxation in actions which are not pauper actions is, that the unsuccessful party is bound to pay his opponent those costs which the opponent was reasonably entitled to incur, and has either paid, or rendered himself liable to pay. Applying this rule to pauper actions, it would follow—unless we give some technical meaning to the term "dives costs"—that a pauper plaintiff could only recover under rule 31, costs which he had paid or was liable to pay. In the case of counsel's fees the pauper is not liable to pay them, he is only bound to pay, according to professional rules, fees marked on the brief, and I cannot see how this difficulty could ever be got over in pauper cases, for a counsel ought not to accept a fee marked on his brief after the litigation is terminated. If he is allowed to do this in a pauper case, the result is that the suitor makes him a present out of the defendant's pocket. So in the case of solicitor's costs. The solicitor's costs which are taxed to the plaintiff in ordinary cases are not merely what the solicitor has paid out of pocket in carrying on the suit, but he is also allowed a profit for his labours. But in a pauper case there is no retainer of the solicitor by the plaintiff. I cannot see how he ever could maintain an action for remuneration. But as it would be unjust that the solicitor, where the pauper succeeded, should lose the actual expenses which he had incurred, the Common Law Courts made it a practice to allow him costs out of pocket. These costs do not include only the items which are merely cash out of pocket, such as the expenses of witnesses, and other payments: they include also the value of the services of the solicitor's clerks who are taken away from other business; because these are substantially costs out of the solicitor's pocket. Costs like these may well be allowed, though "dives costs" are abolished. I have not seen the plaintiff's bill, and I do not know what items it contains, but I think it ought to be taxed on the principles I have stated, and that the master should be directed to deal with it accordingly.

BOWEN, L.J. I am of the same opinion. The question is extremely difficult and obscure, and it is impossible to put a satisfactory construction upon rule 31, without previously considering the whole practice in common law and equity as to the taxation of costs in an action by a pauper plaintiff. It is also of particular importance to ascertain the practice in the year 1849, when the Consolidated Order XL., r. 5, first came into operation. At common law costs are the creature of statute, and the first Act of Parliament as to costs in formâ pauperis is 11 Hen. 7, c. 12, which, in s. 1, enacted that paupers might sue out writs without payment, and that counsel and attorneys should be assigned to them, who should take nothing for their services. A practice, however, seems to have grown up, notwithstanding the statute, by which so soon as a pauper recovered a substantial sum, first fixed at a sum exceeding 5*l.*, he was dispaupered, and the effect of his being dispaupered was that he was enabled to pay counsel and attorneys, and recover the amount from the opposite side. This practice continued until 1854, when it was considered in *Dooly* v. *Great Northern Railway Co.* (1) In that case Lord Campbell said that the Statute of Gloucester gave the plaintiff recovering damages the costs of his writ, but that as a pauper plaintiff was not liable, either at law or in honour, to pay professional remuneration to his attorney, he could not recover anything in respect of it from the defendant, though a practice to the contrary had grown up.

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(1) 4 E. & B. 341.

Wightman, J., also says that a practice had obtained by which, when the plaintiff suing in formâ pauperis recovered more than 5*l.*, he did pay fees both in court and to counsel and to attorneys, and though when he recovered less than 5*l.* he was allowed on taxation only costs out of pocket, when he recovered more he was allowed these fees so paid. And the learned judge says that this practice was contrary to the law, and that rule 121, of Hilary Term, 1853, was directed against it. This rule expressly provides that no fees shall be payable by a pauper to his counsel or attorney by reason of his having obtained a verdict for more than 5*l.*, and rule 28, of the Pleading Rules, Hilary Term, 1853, further orders that a pauper shall in no case be entitled to costs from the opposite party without the order of a judge. Therefore in 1854 the practice of the Common Law Courts upon this subject was settled. But in order to properly interpret rule 31, we must further consider the practice in Chancery. In Chancery costs were not, as in common law, the creature of the statute, and did not follow the event, but were in the discretion of the Court. The Court of Chancery, following the common law, allowed paupers to sue upon proof that they were not worth 5*l.*, and where the paupers succeeded they adopted a rule by analogy to the provisions in common law, that is, they adopted the common law practice, so far as they thought it consistent with justice. And in 1701 Lord Somers allowed a pauper "dives costs," that is, costs like other suitors, "for though he was at no costs yet the counsel and clerks do not give their labour to the defendant but to the pauper." This is a wholly different principle from that on which the Common Law Courts appear to have acted, for they seem to have thought the pauper's right to costs arose from his being dispaupered by a verdict in his favour. In 1795 Lord Loughborough, in *Wallop* v. *Warburton* (1), ordered a pauper's costs to be taxed as "dives costs," but the case is chiefly valuable for this, that Lord Loughborough inquired into the practice in the common law court and ascertained that it was as it continued to be until *Dooley* v. *Great Northern Railway Co.* (2) In *Rattray* v. *George* (3) Lord Eldon held that the Court had a discretion to allow a pauper dives costs, and in 1849, shortly before Consolidated Order 40, came into operation, Lord Cottenham, in *Rubery* v. *Morris* (1), discusses and explains the practice of the Chancery Courts, saying that it is not right that a rule for the benefit of pauper litigants should operate in favour of their opponents. Lord Cottenham seems to have thought that where costs were awarded generally to a pauper he would only be entitled to pauper costs, and he therefore made a special order that in the particular case the pauper should have dives costs, and says that it is a matter for consideration whether there should be a general order altering the practice. This probably led to Consolidated Order XL., r. 5. We find therefore that at common law down to the Judicature Acts, the costs of the pauper were at common law not in the discretion of the Court, while the Chancery Court had power over them. As to the meaning of the term "dives costs," the Master of the Rolls has sufficiently discussed the subject. They appear to be costs which the pauper, although not bound to pay, did in fact pay to his counsel or solicitor, and upon proof that he had paid such costs he was allowed to tax them as against his opponent. This was of course contrary to the terms of the statute of Henry 7, and the Practice Rules at common law, for they expressly prohibited the solicitor from receiving any profit for his services.

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(1) Cox, Ch. Ca. 409.

(2) 4 E. & B. 341.

(3) 16 Ves. 232.

Now what are the facts in the present case? The action was tried by a judge and jury, and the costs would, in other cases, follow the event, and not be the subject of a special order. They would be payable under the judgment. It is very questionable, therefore, whether Order XVI., r. 31, applies to such a case. It may however be said that this is a somewhat technical construction of the rule, and I will therefore assume that rule 31, applies to this case, and that the judgment for the plaintiff is equivalent to an order that costs shall be paid to him within the rule. It remains for us to consider the meaning of this rule. The Regulæ Generales have been dropped, the statute of Henry 7 is repealed, and a new practice as to pauper costs is created. Are we compelled to construe this rule as if it contemplated a payment of costs by the pauper to his solicitor? The rules immediately before rule 31, are opposed to this view. Rule 24, says that no fees shall be payable by a pauper to his solicitor, and rule 27, that any person who agrees to take a fee for the conduct of his business shall be guilty of a contempt of Court. I think that these rules throw light on rule 31, and that when we find that it departs from the language of the Consolidated Order XL., r. 5, it is impossible to construe it as if it meant the same thing. It no longer uses the words "dives costs," but says that pauper costs shall be taxed "as in other cases." I take this to mean that the costs are to be taxed upon the same principle as costs are taxed in other cases, and that the pauper is not to be allowed costs which he was never obliged to pay, simply because he has chosen to pay them after obtaining judgment. I feel rather doubtful as to the construction, for I daresay the rule was drafted without reference to the practice at common law, but upon the whole I think it the right one, and it will be for the Rule Committee to alter the rule if they think that it does not carry out what they consider expedient. With regard to some of the items they are clearly not within the rule, for they were not paid nor did the plaintiff ask for an adjournment to pay them, which, in any view of the case, was necessary. But I do not wish to discuss such points as this, my decision is upon the broad grounds which I have already stated. The appeal will be dismissed with costs, to be deducted from what was to be paid by the defendants under the master's allocatur.

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(1) 1 M. & G. 413.

Order affirmed.

Solicitors for plaintiff: *J. E. & H. Scott.*
Solicitors for defendants: *Hickin & Graham.*

A. P. S.

[IN THE COURT OF APPEAL.]

1885
April 22.

SMITH *v.* CRITCHFIELD AND OTHERS.
JENNER, CLAIMANT.

Practice—Interpleader by Sheriff—Fi. Fa.—Order LVII., r. 1 (*b*)*—Proceeds or Value of Goods taken in Execution—Money paid to Sheriff under Protest —Trespass on Land of Person other than Execution Debtor—Protection to Sheriff against Action for Trespass.*

Where the sheriff seized goods under a fi. fa. and a person other than the person against whom the process issued claimed the goods and paid out the sheriff under protest:—

Held, that the money so paid to the sheriff under protest was the proceeds of goods taken in execution within the meaning of Order LVII., rule 1 (*b*), and that therefore the sheriff was entitled to interplead in respect thereof.

By the Court,—Where the sheriff in the execution of a fi. fa enters the premises of a person other than the execution debtor and there seizes goods believing erroneously that such goods belong to the execution debtor, the sheriff may, upon interpleader proceedings, be protected against an action for trespass to the land as well as against an action for seizure of the goods, if no substantial grievance has been done to the person whose premises are wrongfully entered.

Hollier v. *Laurie* (3 C. B. 334) discussed, and *Winter* v. *Bartholomew* (11 Ex. 704; 25 L. J. (Ex.) 62) approved.

APPEAL from the decision of the Queen's Bench Division, affirming an order of Field, J., at chambers.

The facts were as follows:—

Smith having brought an action against Critchfield and others, the defendants succeeded and recovered judgment for their costs, upon which a fi. fa. against Smith was issued and placed in the hands of the sheriff of Sussex. A warrant was issued to an officer of the sheriff to levy under the fi. fa. The execution debtor being described in the writ as of 29, Robertson Street, Hastings, the sheriff's officer proceeded to that address, where one Jenner carried on business as a bookseller, there saw the execution debtor and Jenner, and stated that he had come to seize under the writ against Smith. Jenner alleged that Smith did not reside there but was only a shopman of his, and that he himself was the owner of the shop and premises and all the goods thereon. Jenner also told the sheriff's officer that Smith resided at another address in the town. The sheriff's officer went to inquire there and made inquiries elsewhere in the town, the result being that he was informed that the execution debtor had taken goods to 29, Robertson Street, and was believed to reside there. He thereupon returned to 29, Robertson Street, and said that he must remain in possession. He then went to the rear of the shop, where he remained, as he alleged, out of sight of any one entering the shop. The following day Jenner said that he should pay the amount to be levied (9*l.* 12*s.* 4*d.*) under protest. He accordingly paid that sum to the sheriff's officer, who then withdrew from the premises. Jenner then gave notice to the sheriff that the goods seized were his, and that he intended to claim damages against the sheriff for trespass and wrongful seizure of his goods, and the return of the money paid under protest. The sheriff thereupon took out an interpleader summons calling on the execution creditors and the claimant to appear and state the nature of their respective claims to the money, goods, and chattels seized. On the hearing of the summons before the master it was contended for Jenner that the case was not within the enactments with regard to interpleader, not being a case of conflicting claims to money or goods taken in execution or the proceeds thereof. The master refused to make any order. The sheriff appealed to Field, J., at chambers, who made an order allowing the appeal and referring the matter back again to the master to adjudicate upon. Against that order Jenner appealed, and the Divisional Court affirmed the order.

Jelf, Q.C., and *Safford*, for the claimant Jenner. There is no jurisdiction in this case to grant relief to the sheriff by interpleader. The case is not one to which the provisions relating to interpleader apply. Order LVII., r. 1 (*b*), which deals with sheriff's interpleader, provides for interpleader proceedings where "a claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued." Here there is no such claim to any money, goods, or chattels taken in execution, nor to the proceeds of any such goods. The money paid under protest was not money taken in execution. The term "proceeds" of the goods means the proceeds of a sale of them under the writ, and does not apply to money paid in order to buy out the execution.

[BOWEN, L.J., referred to *Bissicks* v. *Bath Colliery Co.* (1)]

The real object of the interpleader proceedings here is obviously not to determine the right to the 9*l.* 12*s.* 4*d.* paid under protest, but to obtain an order to prevent an action against the sheriff. It is contended that this is not a case in which the protection required can be given to the sheriff, even if he can interplead; and, though that question is not strictly before the Court, it might save further expense if the Court would express an opinion to that effect. Where, as here, the sheriff goes on the premises of a third person to seize goods of the execution debtor, he does so at his peril, and if there turn out to be no such goods there, he is liable to an action; and the scope of the Interpleader Acts does not extend to giving him protection in such a case against the action for trespass to the land: *Hollier* v. *Laurie.* (2) This is not like the ordinary case where the entry and seizure is on the premises of the execution debtor, but the goods there seized are claimed by a third party.

[BOWEN, L.J., referred to *Winter* v. *Bartholomew.* (3)]

That case turned on the fact that some of the goods seized were the property of the execution debtor, and therefore the sheriff had a right to enter. It was there said that, if there was a real grievance, the action would not be restrained. In the present case there was a substantial grievance involved in putting an execution into the shop of a third person, a trader, without any justification.

[BRETT, M.R. Is it not a fallacy to treat the trespass to the land and goods as severable for this purpose? It is clear that the sheriff can be protected in respect of the trespass to the goods.]

After all, the question whether the sheriff can be protected does not arise, and cannot be decided on this appeal, the only question now being whether the case is to be referred back to the master for adjudication.

Alfred Cock, for the sheriff. The case of *Winter* v. *Bartholomew* (3) is a distinct authority that the sheriff may be protected in such a case as this against an action for trespass to the land.

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(1) 2 Ex. D. 459. (2) 3 C. B. 334.
(3) 11 Ex. 704; 25 L. J. (Ex.) 62.

[He was then stopped by the Court.]

Edward Pollock, appeared for the execution creditors.

BRETT, M.R. In this case a writ of fi. fa. had been delivered to the sheriff directing him to seize the goods of Smith, the execution debtor. Information had been given to the sheriff's officer that such goods were to be found in a particular house, and he accordingly went to that house to seize them. It is not suggested that he was guilty of any violence or did anything that would have been improper, if the goods in question had been the execution debtor's goods. He is told that the house is Jenner's, and that the goods do not belong to Smith but to Jenner. He makes inquiries, with the result that he finds himself in the predicament in which the sheriff's officer generally is placed in such cases, viz., that the property in the goods being disputed, if he withdraws and it turns out that the goods were the execution debtor's, the sheriff will be liable to an action by the execution creditor; but, if he seizes and the goods turn out not to be the execution debtor's, the sheriff will be liable to an action by the owner of the goods. Under these circumstances he ultimately seizes, and Jenner then, to get rid of the execution, pays the amount of 9*l.* 12*s.* 4*d.* under protest, still maintaining that the goods are his. The meaning of paying under protest necessarily is that the party paying the money does not pay it by way of rightful payment, but claims it still as his money in the hands of the person to whom it is paid. The money being so paid to him, the sheriff was in this position: if the goods belonged to Smith, the money belonged to the execution creditors; if the goods belonged to Jenner, the sheriff would have to pay it back to Jenner. Under those circumstances he seeks to interplead, but it is argued that there is no jurisdiction to make an interpleader order, on the ground that the case does not come within the terms of Order LVII., r. 1. That order provides that relief by way of interpleader may be granted (*b*) where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and a claim is made to any money, goods, or chattels taken or intended to be taken in execution under any process, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued. I think this money paid under protest, under the circumstances above described, is within the terms of the rule. I think it may well be that it comes within the words "money taken in execution." It is money received by the sheriff under and by virtue of the execution. It has been held that where, upon an execution put in, money was paid under protest, there was a levy for the purpose of entitling the sheriff to his poundage. But if this be not money taken in execution, I think it is clearly "proceeds or value of goods or chattels taken in execution." The object of the seizure in execution is that the goods seized may be converted into money to satisfy the judgment. This is usually done, no doubt, through a sale by auction, the sheriff handing over the proceeds of sale to the execution creditor. But is this money any the less the proceeds of the goods, because, instead of being produced by a sale of the goods, it is paid in order that the party paying it may keep his goods? It is money paid to represent the goods, and paid with the intention that it should be paid to the execution creditor if the goods were the execution debtor's. It seems to me that in substance this money is as much proceeds of the goods and chattels taken in execution as if it had been the proceeds of a sale by the sheriff. It would make the law ridiculous to say that in order to be able to interplead the sheriff must go on to sell by auction, with all the expense incident to such a sale, although the party interested in the goods would prefer the less expensive mode of realizing the value of the goods for the purposes of the execution by payment of money under protest. It seems to me that the most reasonable course in such a case is that the money should be paid under protest and should represent the goods, and that it would be a most absurd result if the sheriff, who is not bound to receive money paid under protest, should be obliged to put the parties to the unnecessary expense and loss of a sale by auction to preserve his right to interplead. I am of opinion that the argument for the claimant cannot be sustained, and that the case comes within the terms of Order LVII., r. 1.

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SMITH
v.
CRITCHFIELD.

Brett, M.R.

But another point was raised as to which it must be admitted that we cannot upon this appeal give a binding judgment, but as to which I think it is desirable to express our opinion, the matter having been discussed at some length, and being one of general importance, and the contention made being, to my mind, a most dangerous one. The question raised was as to the power of the judge in making the interpleader order to protect the sheriff from an action in such a case as this. The necessity for such protection is based on the assumption that the sheriff has committed a tortious act, for otherwise he would not require protection. It is not, of course, in every case that the judge will protect the sheriff. He will be protected when he has only made an honest mistake in executing the process of the court, and but for such mistake everything that he has done would have been justified by the writ. Then against what is he to be protected? It is contended that he may be protected in respect of one part and not in respect of another part of what is really one simultaneous action done by him under the writ of execution; that he may be protected from an action for wrongfully seizing the goods but not from an action for wrongfully walking into the house to seize them. I do not think this contention can be sustained. The trespass to the house and the trespass to the goods are, as it seems to me, parts of one action which is intended to be done under the writ, and which would have been rightful if the goods had belonged to the execution debtor, but which is in fact wrongful because of the sheriff's mistake as to the property in the goods. If there had been goods in the house which the sheriff could rightfully seize under the writ, the sheriff would not have been a trespasser, but, there not being any such goods in the house, the entry on the house was a trespass. It seems to me that the sheriff is entitled to protection in respect of the whole of the act which through error he has wrongfully done under the writ, that is, in respect of his having entered the house and seized the goods. What do the authorities say? In the case of *Winter* v. *Bartholomew* (1) it is said that the sheriff may be protected in such a case as this in respect both of the trespass to the land and that to the goods where no real grievance has been sustained by the claimant. It is obvious that that cannot mean where there is no legal wrong, because by the hypothesis a tortious act must have been committed. It is clear, therefore, that by "no real grievance" is meant no substantial grievance beyond the mere entry and seizure of the goods, such as might exist if the sheriff's officer were guilty of insolent or oppressive conduct in excess of his duty, and not justified by the writ. The consequences of the contention for the claimant would be absurd. The sheriff cannot seize the goods without entering, and in so doing he is only doing what is absolutely necessary for the purpose of seizing the goods; but it is contended that, though in respect of the seizure he may be protected, in respect of the entry he cannot be protected. It would follow that in every case of this kind, except where he happened to seize goods in the street, he would be liable to an action of trespass for the entry on the land, and the protection intended to be given to sheriffs by the enactments relating to interpleader would be nugatory, for in every such case there would be an action against the sheriff. I will venture to say that from the passing of the first Interpleader Act to the present time orders have constantly been made giving this protection to sheriffs. Though this point is not raised on the appeal, and we cannot give a binding judgment upon it, nevertheless, as it has been argued, I have thought it right to express an opinion upon it. All we can do at present is to dismiss the appeal and send the matter back to the master at chambers.

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(1) 11 Ex. 704; 25 L. J. (Ex.) 62.

BAGGALLAY, L.J. The first contention of Mr. Jelf was that the case did not come within the terms of Order LVII. r. 1, sub-s. (*b*), on the ground that there was not here any claim to money or goods taken in execution, or the proceeds of such goods. I think that the observations made by the Master of the Rolls sufficiently dispose of that contention, and that this is a case in which an interpleader order can be made. Therefore the appeal must fail, and the case must go back to the master. But there was another contention made before us by Mr. Jelf, upon which, though it could not affect our decision on the appeal, he at first desired an expression of our opinion. It was said that before the master at chambers the question would be raised as to whether the sheriff was to be protected from an action, and that this was not a case in which, under the enactments on the subject, protection could be given to the sheriff against an action of trespass. Mr. Jelf eventually sought to withdraw that part of his argument, and contended that all we could do was simply to dismiss or allow the appeal. But, the Master of the Rolls having expressed his opinion on the point, I desire to say that, as at present advised and upon the argument so far as it has gone, it appears to me that the case was clearly one in which protection could be given to the sheriff against an action.

BOWEN, L.J. I am of the same opinion. The first point raised was that the claim in the present case could not be the subject matter of interpleader; and, secondly, it was contended that the sheriff ought not to be protected against an action. The first question only is raised upon this appeal. With regard to that question the facts are that the sheriff's officer goes to the house and constructively seizes the goods and is afterwards paid out by Jenner under protest. It is clear, upon the authority of *Bissicks* v. *Bath Colliery Co.* (1), that the sheriff would, in such a case, be entitled to his poundage as upon a levy if the goods were the execution debtor's, and it seems to me to follow necessarily that the money so received must be regarded as the proceeds of the goods. It therefore follows that, the money being claimed by the execution creditors and Jenner, the case comes within the terms of Order LVII. r. 1 (*b*). It is not necessary in my opinion to say whether the money paid under protest is money taken in execution within the meaning of that rule. I am not at all sure that it is not, but I feel sure that it is the proceeds of goods taken in execution, and is therefore the subject matter of interpleader. With regard to the other question, Mr. Jelf says that the sheriff is not to be protected because he entered the house without any justification. It seems to me clear from the decision of the Court of Exchequer in *Winter* v. *Bartholomew* (2) upon the Interpleader Act, 1 & 2 Wm. 4, c. 58, that in such a case as this the Court has power to give the sheriff protection in respect of the entry on the land as well as in respect of the seizure of the goods. If there were not this power the protection given would be inefficacious, because in most of these cases where the seizure of the goods is wrongful there must be also a nominal trespass to the land. In *Winter* v. *Bartholomew* (1) the Court said that where there was such a mere nominal trespass but no substantial grievance, they could protect the sheriff against an action in respect of such trespass, though, where there was a substantial grievance besides the mere entry for the purposes of seizure, they would refuse protection. Pollock, C.B., in that case said: "I am of opinion, upon the true construction of the Act, the Court or a judge may stay the proceedings in such an action. The case of *Hollier* v. *Laurie* (2) is no authority the other way . . . . that case is no authority to prevent us from staying the proceedings in an action where there is no real grievance beyond that of the seizure of the goods." Alderson, B., concurred, saying, "If the sheriff has been guilty of misconduct, the Court will not protect him; but, where he has done no wrong, the legislature intended that the Court or judge who makes the interpleader order should protect him against vexatious actions." Platt, B., said that the 6th section of the Act authorized the judge to make such decision as should appear to be just according to the circumstances of the case, and that nothing could be more just than to prevent the sheriff being harassed by an action in which no more than nominal damages could be recovered. Martin, B., said, "The case of *Hollier* v. *Laurie* (2) seems to me to proceed on the fallacy that there are two rights of action against the sheriff, one for entering the house and another for seizing the goods; whereas in truth there is but one right of action in respect of the whole transaction, and as to that the Interpleader Act enables the Court to stay proceedings. Such has been the constant practice. If indeed the sheriff in the execution of the writ has committed any real grievance the Court will allow the injured party to bring an action, but if he has done no real wrong the Court will stay proceedings against him." It seems to me impossible not to say that the decision in *Winter* v. *Bartholomew* (1) has displaced *Hollier* v. *Laurie* (2), except so far as that case may be treated as distinguishable on

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(1) 2 Ex. D. 459.

(2) 11 Ex. 704; 25 L. J. (Ex.) 62.

(1) 11 Ex. 704; 25 L. J. (Ex.) 62.

(2) 3 C. B. 334.

the ground upon which it was distinguished in *Winter* v. *Bartholomew*. (1) For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for sheriff: *Palmer & Bull.*

Solicitors for claimant: *Tippetts & Son*, for *C. Chambers.*

Solicitors for execution creditors: *Angell, Imbert, Terry, & Page.*

E. L.

April 23.

[IN THE COURT OF APPEAL.]

SKINNER *v.* THE CITY OF LONDON MARINE INSURANCE CORPORATION.

Damages—Company—Neglect to register Transfer of Shares—Companies Act, 1867 (30 & 31 *Vict.* c. 131), s. 26.

The plaintiff transferred shares of his in a registered company to A. B. on an agreement between them that if A. B. was accepted as shareholder by the company the shares should be taken by him at their market value in reduction of a debt due to him from the plaintiff. The consideration was stated in the transfer to be only the sum of 5*s.*, and the transfer was brought to the company for registration without any notice of the said agreement between the plaintiff and A. B. The company refused to register, on the ground that the plaintiff was indebted to them, but on its being established after an interval of eighteen months that the plaintiff was not so indebted, the company registered the transfer. In an action against the company for wrongfully refusing to register, the plaintiff sought to recover as damages the loss in the market value of the shares between the time when the transfer was brought to the company to be registered and the time when it was in fact registered:—

Held, that the plaintiff was entitled to recover only nominal damages, as the contract between the plaintiff and A. B. was a special one, of which the company had had no notice, and the ordinary contract on the sale of registered shares was only that the seller should give to the purchaser a valid transfer and do all required to enable the purchaser to be registered as member in respect of such shares, the duty of the purchaser, which has not been altered by s. 26 of the Companies Act, 1867, being to get himself registered as such member.

ACTION in the Mayor's Court, London, for wrongfully refusing to register a transfer of shares in the defendant company.

On the 1st of November, 1882, the plaintiff, who was the holder of 1300 shares in the defendant company, executed a transfer of the shares to one Arthur Abraham Levy, and on the 7th of that month the transfer was presented to the company for registration, when they refused to register it on the ground that the plaintiff was indebted to them in a sum of money. If there had been such indebtedness the company would by the terms of their articles of association have had such right to refuse to register, but after bringing an action (which they did) against the plaintiff for their alleged debt, they failed to establish it, and they therefore, namely, in April, 1884, registered the transfer of the shares to A. A. Levy. In the meantime the market value of the shares had greatly fallen, they being worth 26*s.* each at the time the transfer was presented for registration, and only 10*s.* each at the time it was actually registered. The deed of transfer was in the ordinary form of a bargain and sale of shares, and the only consideration which was stated was that of 5*s.*, but at the trial evidence was given on the part of the plaintiff that Levy had agreed at the time of the transfer that he would on being accepted shareholder by the company take the shares at their market value in reduction of a debt of 2000*l.*, which the plaintiff owed him. There was no evidence of such agreement having been ever brought to the notice of the company, but the jury, under the direction of the learned recorder, found a verdict for the plaintiff for 1248*l.* A rule nisi was afterwards obtained on behalf of the defendants to set aside this verdict and for a new trial, on amongst other grounds, that the damages were excessive.

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(1) 11 Ex. 704; 25 L. J. (Ex.) 62.

The Divisional Court (Lord Coleridge, C.J., and Smith, J.), made the rule absolute for a new trial, being of opinion that none of the heads of damages in respect of which the verdict had been given could be sustained. The first of these heads was for the loss the plaintiff had sustained by the fall in the value of the shares between the time of their transfer to Levy and the time when Levy's name was entered on the register of shareholders. The other heads of damages, the items in respect of which formed only a small part of the sum for which the verdict was given, it is not necessary to refer to in this report, as they were abandoned by the plaintiff after the Divisional Court had disposed of them, and leave to appeal was given only with regard to the first head of damages.

The plaintiff appealed accordingly.

Cohen, Q.C., and *Masterman*, for the plaintiff. The plaintiff is entitled to substantial damages. The 35th section of the Companies Act, 1862 (25 & 26 Vict. c. 89), enables the person or member of a registered company, who is aggrieved by an improper entry or omission to enter in the register of members of the company, to apply to the Court or judge of any of the Superior Courts to have the register rectified, and the company may be directed to pay the costs of the application and any damage the party aggrieved may have sustained. Then s. 26 of the Companies Act, 1867 (30 & 31 Vict. c. 131), enacts that a company shall, on the application of the transferor of any share in the company, enter in the register of members the name of the transferee in the same manner as if the application were made by the transferee. In the present case the defendants, by setting up an alleged debt as being due to them from the plaintiff, and by refusing on that account to register any transfer, had prevented the plaintiff from disposing of his shares. *Wilkinson* v. *Lloyd* (1) shews that a seller who is unable to get a transfer of his shares registered is liable to the purchaser for the price paid for the shares. The conduct of the company in setting up this debt deprived the plaintiff of his market value of his shares at the time of his transfer to Levy, for no one with the knowledge of such circumstances as would prevent a registration of the transfer would have given full value for the shares. The company ought to be liable for more than nominal damages, for as they knew there was a disputed debt between them and the plaintiff which would prevent the plaintiff from selling and transferring his shares in the ordinary way, and as they found that the consideration for the transfer to Levy was only the nominal one of 5*s.*, they ought to have inquired as to what were the terms of the contract between the plaintiff and Levy. Independently of the Companies Acts the plaintiff would have a remedy against the company for wrongfully refusing to register the transfer of the shares. It was assumed in *Ward and Henry's Case* (2) that there was a remedy apart from this statute, and it was therefore considered that the 35th section of the Companies Act, 1862, was intended only to give a summary power to effect such remedy where the Court or judge thought it desirable in its discretion to use it. That case is referred to by Mr. Buckley in his notes on that section (see Buckley on the Companies Acts, 4th ed. pp. 90, 91).

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(1) 7 Q. B. 27.

(2) Law Rep. 2 Eq. 226; 2 Ch. 431.

[BRETT, M.R. Lord Cairns, in that case, after referring to the sale and transfer by Ward of the shares to Stafford, says (Law Rep. 2 Ch. 438), "it was the duty of Stafford as between himself and Ward to have taken in the transfer to the company, and to have had his name substituted for that of Ward on the register, and that Ward could have compelled Stafford to perform this duty and to indemnify him, Ward, against any loss occasioned by his remaining the registered owner of the shares."]

With reference to the duty to procure the registration of the transfer, Lindley, L.J., in Lindley on Partnership, 4th ed., vol. i. p. 712, has the following passage: "It has been said that it is the vendor's duty to procure the registration of the shares in the name of the purchaser. But this is probably going too far, and it appears more correct to say that the purchaser takes the risk of any objection being made by the company to himself as the transferee, and also the risk of all other objections not based on the right of the transferor to transfer his shares." (1)

Lockwood, Q.C., and *Moulton*, for the defendants. The case of *Wilkinson* v. *Lloyd* (2) has no application here, as there the seller was unable to give the transferee of the shares the right to entitle him to demand the company to register him as the shareholder, and there was therefore a failure of consideration. Here the plaintiff has suffered no damage by his name remaining on the register, for the company has not been wound up and no calls have been made on the shares, and the only ground he can have for recovering more than nominal damages must be that by reason of some contract with Levy he, the plaintiff, was to get the transfer registered, and that by not doing so he lost his right to the value of the shares at the time they ought to have been registered; but the company had no notice of any such contract—all that appeared was that there had been an ordinary bargain and sale, and that the consideration money was 5*s*., and that that had been paid. There is nothing in s. 26 of the Companies Act, 1867, to alter the duty of the transferee to get the transfer registered, and Levy had a complete title to the shares and could have compelled the company to have registered him as a shareholder, so that the damages the plaintiff can recover in this action can only be nominal.

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(1) It was contended on behalf of the plaintiff that there was power under Order XVI., rr. 2 and 11, to amend the pleadings if necessary by substituting as plaintiff the name of Levy for that of the plaintiff, but this was abandoned on its being pointed out that it had been held in *Pryor* v. *City Offices Company* (10 Q. B. D. 504), that the Orders and Rules of the Judicature Acts do not apply to the Mayor's Court, London.

(2) 7 Q. B. 27.

Cohen, Q.C., replied.

BRETT, M.R. In this case the plaintiff has brought an action against the defendant company for having wrongfully refused an application made by the plaintiff under s. 26 of the Companies Act, 1867, to register in the company's register of members the name of Arthur A. Levy, to whom the plaintiff alleged he had transferred certain shares of his in the company, and by virtue of which transfer he called on the company to make such entry. The cause of action was the wrongful refusal of the company to comply with such application. The company had a right to refuse to so register if there was a debt due to them from the plaintiff, but when they alleged there was such debt, they took the risk of whether that was true or not, and when it turned out, as it did, that there was no such debt, they were in the wrong and had committed a breach of duty in not having complied with the plaintiff's application to register. The plaintiff was, therefore, entitled to recover in respect of such breach of duty at least nominal damages, but he alleges that he was entitled to substantial damages. It is clear that there might be more than nominal damages in such a case, for by not complying with the application to enter the name of the transferee of the shares the transferor might be made liable for calls, or in other ways to contribute to the debts of the company. In the present case, however, there was no evidence of anything coming under that class of damage, and what the plaintiff sought to recover by way of substantial damage was not of that description, but was this: There had been a loss occasioned by the value of the shares having fallen in the market between the time when the transfer ought to have been registered and the time when in fact it was registered; and, therefore, assuming there was such a contract as the plaintiff alleged between him and Levy, by reason of which the plaintiff has been damnified by such loss in the value of the shares, the question is whether the plaintiff can make the company liable for this as a loss happening in consequence of their breach of duty to register the transfer. If the contract between the plaintiff and Levy was a special one which differed from what would be the ordinary contract on the sale of registered shares in a company, then it would come within the principle of *Hadley* v. *Baxendale* (1), and the company would not be liable for the damages sought to be recovered unless the terms of such special contract had been previously brought to their attention. It cannot be said that in this case the company had had notice of the terms of any such contract, or that they ought at the time of this breach of duty to have anticipated the existence of anything more than that of the ordinary contract on a bargain and sale of the shares. That, therefore, raises the question what is the ordinary contract by the seller on a bargain and sale of registered shares of a company. It seems to me that the only contract in such a case is that the seller shall execute a valid transfer of the shares and hand the same over to the transferee, and so do all that is necessary to enable the transferee to insist with the company on his right to be registered a member in respect of such shares. That is in accordance with what was laid down by Lord Cairns under the Companies Act, 1862, in *Ward and Henry's Case.* (2) So that when the transfer has been executed and handed over to the transferee, it is then for the latter to pay the consideration money and to get the transfer registered. Now, is there any difference made in respect of this by s. 26 of the Companies Act, 1867? I think not. It was not, I think, intended by the legislature that that enactment should alter or have any effect on the duty of the transferee, and that it is still his duty, as it was before that enactment, to get himself registered a member of the company in respect of the shares which have been transferred to him, and that this s. 26 of the Companies Act, 1867, was only for the protection of the transferor in case the transferee failed to perform his duty. If that be so, then the company, by refusing to register upon the application which was made to them under s. 26 of the Companies Act, 1867, were only bound to pay such damages as would be the probable result had the contract been the ordinary one in the terms I have just stated, unless they were shewn to have had notice of the special contract relied on by the plaintiff as existing between him and Levy. As the company were not shewn to have had such notice, it follows that the plaintiff cannot recover against them any difference between the market value of the shares at one time and at another time, and that if the action were to go back for a new trial the plaintiff could never be entitled to recover anything more than nominal damages, and it would be the duty of the judge so to direct the jury. Under these circumstances, there ought, we think, to be no new trial, but the verdict should be entered for nominal damages, and this appeal should be dismissed.

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(1) 9 Ex. 341; 23 L. J. (Ex.) 179. (2) Law Rep. 2 Ch. 431, at p. 438.

BAGGALLAY, L.J. I am of the same opinion. When the transfer was left at the office of the defendant company for registration, the company were not called upon to recognise more than appeared from the document, namely, a transfer of the shares for the nominal consideration of 5*s*. The company, however, were bound to have registered such transfer at once. The reason why they declined to do so was, that they claimed to have a debt against the transferor, and according to the articles of association, on which they relied, they were entitled to refuse if the transferor was indebted to them. It turned out that the company's claim to a debt was without foundation, and in April, 1884, after a delay of eighteen months, the transfer was registered by the company. There is no question but that the company were in the wrong, and that consequently they were liable to the plaintiff in damages for refusing when they did to register the transfer, but the question is what ought to be the measure of such damages. Now what were the damages which probably would be the result of such refusal to register? Why the plaintiff by reason

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of his name remaining on the register of members might become liable for calls afterwards made, or to contribute on the winding-up of the company, but none of these had occurred, and no such damage whatever had been sustained. It was alleged on the part of the plaintiff that in November, 1882, there was a collateral agreement between him and Levy, to whom the shares were transferred, by which it was agreed that in lieu of the consideration of 5*s.* stated in the deed of transfer there was to be read such sum as was the market value of the shares at the date of the transfer being registered. Now it may be that there was such agreement, and that as between the plaintiff and Levy the plaintiff had a right to treat the shares as of that value, but there is nothing in the evidence by which the company ought to be fixed with this, and I cannot see that the mere fact, either of the plaintiff being alleged to be indebted to the company, or of the consideration being stated in the deed to be only 5*s.*, was sufficient to put the company on some inquiry as to the nature of the agreement between the plaintiff and Levy. In my opinion the company were justified in dealing with the document as an ordinary transfer of shares, but as they neglected to register it when they ought to have done so, they are liable to the plaintiff in this action for damages, but nominal damages only.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Blewitt & Tyler.*
Solicitors for defendants: *Walter Webb & Co.*

W. P.

1885 March 28.

JONES *v.* THE MAYOR, ALDERMEN, AND CITIZENS OF THE CITY OF LIVERPOOL.

Master and Servant—Negligence—Negligence of Servant hired to drive Cart, Liability of Hirer for.

D. contracted with the defendants, an urban authority, to supply by the day a driver and horse to drive and draw a watering-cart belonging to the defendants. The driver was employed and paid by D., and was not under the defendants' direction or control otherwise than that their inspector directed him what streets to water. In an action to recover damages for injuries caused by the negligent conduct of the driver whilst in charge of the cart:—

Held, that the defendants were not liable.

Quarman v. *Burnett* (6 M. & W. 499) followed; *Rourke* v. *White Moss Colliery Co.* (2 C. P. D. 205) distinguished.

Claim for damages for injuries to the plaintiff's carriage caused by the defendants, or their servants, on the 23rd of May, 1884, negligently driving a cart and horse in Mount Pleasant, Liverpool.

Defence, no negligence by the defendants or their servants; that the man who was driving the horse and cart was not the servant of the defendants; and contributory negligence by the plaintiff's servant.

Issue was joined upon the defence.

The action was tried before Day, J., and a jury at the Liverpool Assizes held in July, 1884.

The injuries to the plaintiff's carriage were alleged to have been caused by the negligence of one Frederick Dean whilst driving a water-cart belonging to the defendants, who were the urban sanitary authority of the city of Liverpool, for the purpose of watering a street in Liverpool.

The evidence with respect to Dean's employment was contained in the answers of the defendants to the plaintiff's interrogatories, and was as follows:—

The driver of the horse and cart mentioned in the statement of claim was the deponent Frederick Dean. He was then in charge of the cart and horse, which the defendants were using as and under the circumstances hereinafter mentioned for the purpose of watering Mount Pleasant. The cart was the property of the defendants; the horse was the property of Margaret Dean.

The driver was not in the employment of, or paid by, the defendants. He was at the time of the accident in the employment of and paid by Margaret Dean. He was under the control, authority, and direction of the defendants to the following extent, and not otherwise:—He was directed by the inspector of the defendants to water certain streets or certain portions of streets from time to time, and under the contract with Margaret Dean hereinafter mentioned the defendants were entitled to require him to obey such directions. The defendants on the 23rd of May hired from Margaret Dean for the day a horse and driver to draw and drive a watering-cart on the terms that they should pay her nine shillings for the use of such horse and driver, and Margaret Dean sent the driver and horse for the purpose and on the terms aforesaid. The contract of hiring was made verbally.

The defendants employed inspectors to superintend the watering of their streets, and it is part of the duty of such inspectors to direct the drivers of the watering-carts when and where to water the streets, and, so far as is necessary for this purpose and not otherwise, the inspectors have authority and control over the drivers and carts. There was no such inspector to the best of our knowledge, information, and belief at or near the place where the accident took place at the time of the said accident, nor then and there superintending or controlling the driver. The inspector came up about a quarter of an hour after the accident, and made inquiries as to the accident.

Day, J., left the case to the jury, who gave a verdict for the plaintiff, damages, 28*l.*; and, after taking time to consider, the learned judge gave judgment for the plaintiff for that amount, holding that, under the circumstances, Frederick Dean must be deemed to have been the servant of the defendants, who were therefore liable.

The defendants moved to have this judgment set aside, and judgment entered for them.

R. S. Wright, for the defendants. This case is covered by *Laugher* v. *Pointer* (1) and *Quarman* v. *Burnett*. (2) The latter decision has never been questioned, and is directly in point, and

(1) 5 B. & C. 547.

(2) 6 M. & W. 499.

was founded upon the principle, which applies here, that the person who has the selection of a servant or workman is responsible if he does not select a person competent to perform the services or do the work. A similar principle was applied in *Hughes* v. *Percival* (1) and *Reedie* v. *London and North Western Ry. Co.* (2)

Aspland and *Synnott*, for the plaintiff. It is unnecessary to dispute the principle of *Quarman* v. *Burnett.* (3) That decision was founded upon a common-sense view of the relation which is known to exist between hirers and letters of private carriages; but the rule laid down is not of universal application, and must receive some limitation: *McLaughlin* v. *Pryor.* (4) The present case is governed by a different rule of law, namely, that where one lends his servant to another, who exercises control over the servant, that other is responsible and not the lender: *Rourke* v. *White Moss Colliery Co.* (5); *Murray* v. *Currie.* (6) Here the driver of the water-cart was the general servant of Mrs. Dean, but he was practically placed at the disposal of the defendants for the day, and they never parted with the control of watering the streets. The exact relation in each case must be looked at: *King* v. *Spurr.* (7)

[MANISTY, J. *Quarman* v. *Burnett* (3) was not cited in *Rourke* v. *White Moss Colliery Co.* (5)]

No; because *Quarman* v. *Burnett* (3) was assumed to apply only to the special relation which exists between job-masters and their customers. If the defendants were not liable, Mrs. Dean would be; and that result appears absurd upon the facts of this case.

GROVE, J. I am of opinion that this case is governed by *Laugher* v. *Pointer* (8) and *Quarman* v. *Burnett.* (3) In the latter case an elaborate and unanimous judgment was delivered, and the opinion of Abbott, C.J., and Littledale, J., in *Laugher* v. *Pointer* (8) was preferred to that of Bayley and Holroyd, JJ., who had differed from the other two learned judges. The facts of the present case are very like those in *Quarman* v. *Burnett.* (1) The water-cart belonged to the defendants, and the driver and horse were hired by them from Mrs. Dean. In *Quarman* v. *Burnett* (1) the carriage belonged to the defendants, who hired the horses and a driver from a job-mistress; and the Court held that the defendants were not liable for injury sustained by the plaintiff through the negligence of the driver. In the present case the negligence must be that of the driver of the water-cart. The only valid distinction that I can see between the two cases is that here the defendants' inspector directed the driver what streets to water; but that fact does not in any way make the inspector guilty of negligence, or responsible for the act of negligence which was committed. If he had interfered when the accident happened by directing the driver of the cart what to do, the case would be different, but he did no more than point out the streets to be watered. I think the discretion and control exercised by the owners of the carriage over the driver in *Quarman* v. *Burnett* (1) was larger than the discretion and control exercised by the inspector over the driver of the water-cart in this case. I can see no valid distinction in principle between the two cases, having regard to the reasoning of the judgment of the Court delivered by Parke, B., in *Quarman* v. *Burnett* (1), which has been followed and approved in numerous cases. I do not think that the cases cited with respect to contractors are so much in point in the defendants' favour as those relating to master and servant, though *Reedie* v. *London and North Western Ry. Co.* (2) (which was a case of contractors) does in one respect go a step further than *Quarman* v. *Burnett* (1), because in the former case the defendants had power to discharge the servant although they did not select him.

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(1) 8 App. Cas. 443.
(2) 4 Ex. 244.
(3) 6 M. & W. 499.
(4) 4 M. & G. 48.
(5) 2 C. P. D. 205.
(6) Law Rep. 6 C. P. 24.
(7) 8 Q. B. D. 104.
(8) 5 B. & C. 547.

It is said that the cases in which one person lends his servant to another apply, and that then the borrower is liable for the negligence of the servant. The distinction between such cases and cases of hiring like the present may be this: where a driver is hired the person from whom he is hired is bound to exercise due care in selecting a man of proper skill and conduct; but it

(1) 6 M. & W. 499.

(2) 4 Ex. 244.

is otherwise with the lender for no reward of a servant. The person who borrows takes him cum onere, and is liable for his negligence whilst in the borrower's employment. Whether that be the true distinction or not, I am of opinion that the principle of *Quarman* v. *Burnett* (1), and the class of cases which have followed that decision, ought to be applied here; that the transaction being one of hiring and not of loan, and the negligence complained of being that of Mrs. Dean's servant, not of the defendants' servant, the defendants are not liable.

MANISTY, J. I am also of opinion that judgment should be entered for the defendants. I agree with my Brother Grove that *Quarman* v. *Burnett* (1) is directly in point. I do not think that *Reedie* v. *London and North Western Ry. Co.* (2) is in point. The decision was that a servant employed by the contractor did not cease to be his servant from the mere fact that the defendants who employed the contractor had power to discharge the servant. In *Rourke* v. *White Moss Colliery Co.* (3) the engineer was lent by the defendants to the contractor, and was under his control. The case is therefore quite different from this. It may be that the borrower of a servant takes him, as it were, for better or worse, and is liable for his negligence. In *Murray* v. *Currie* (4) the stevedore employed by the defendant employed one of the defendant's crew, whom he paid and over whom he had entire control, to assist his own men in unloading the vessel. I do not think that case has any application here. The two last-mentioned cases were the only ones cited in the plaintiff's favour. I do not think either of them is in conflict with *Quarman* v. *Burnett.* (1)

Motion granted.

Solicitors for plaintiff: *Worthington Evans, for Jones, Paterson, & Co., Liverpool.*

Solicitors for defendants: *F. Venn & Co., for the Town Clerk of Liverpool.*

(1) 6 M. & W. 499.
(2) 4 Ex. 244.
(3) 2 C. P. D. 205.
(4) Law Rep. 6 C. P. 24.

W. A.

THE ATTORNEY GENERAL *v.* THE MARQUESS OF AILESBURY AND OTHERS.

1885
March 20.

Revenue—Probate Duty—Lunatic—Accumulations of Personal Estate—Investment in Realty—Conversion.

The committees of a lunatic acting under the orders of the Lords Justices of Appeal sitting in Lunacy invested the accumulations of the personal estate of the lunatic in the purchase of land. The conveyances to the committees contained, in conformity with such orders, declarations that the land purchased should to all intents and purposes be considered as part of the personal estate of the lunatic, but contained no trust for sale:—

Held, that on the death of the lunatic the value of the investment was personal estate liable to probate duty.

INFORMATION to recover duty payable under the Customs and Inland Revenue Act, 1881 (44 Vict. c. 12), in respect of certain investments representing portions of the personal estate and effects of Sir Henry Meux, deceased, of whose will the defendants were executors.

By an inquisition dated the 17th of June, 1858, under an order of the Lords Justices of Appeal, sitting in Lunacy, Sir Henry Meux was found to be of unsound mind. He continued of unsound mind until his death, and his estate was managed and administered by committees, appointed by and acting under the orders of the Lords Justices sitting in Lunacy. Large sums of money, part of the personal estate, accumulated in Court to the credit of the lunatic's estate, and these sums, with the sanction of the Lords Justices, were expended from time to time by the committees of the lunatic in the purchase of land.

All the purchases were directed to be carried out by orders in Lunacy specially applied for on each occasion. In the first and third purchases of land by the committees the conveyances were, by the orders approving the purchases, directed to be made, and were in fact made to the use of the committees, their heirs and assigns, upon trust to raise the amount of the purchase-money, and subject thereto upon trust for Sir Henry Meux, his heirs and assigns. In all the other purchases the conveyances were to the use of the committees, their heirs and assigns, in trust for Sir Henry Meux, his executors, administratiors, and assigns, and there were declarations in each case that the premises granted were to all intents and purposes to be considered as part of the personal estate of Sir Henry Meux. The conveyances were drawn in conformity with the terms of the several orders of the Court sanctioning the respective investments, the intention (as the informant submitted) and the legal effect being that the nature and character of the property as part of the personal estate of Sir Henry Meux should not be in any way altered by the fact of the investments being made, and that it should remain personal estate of the lunatic at his death.

The following statement shews the material parts of the conveyances of the Wootton Bassett estate, and all the other conveyances (with the exception of the two above mentioned) were to the like purport and effect. The indenture recited an agreement for the purchase, subject to the approval of the Lord Chancellor, for the price of 225,000*l.*, exclusive of timber, of the manors, advowson, messuages, farms, lands, tenements, and hereditaments thereinafter described; an order and a certificate of one of the Masters in Lunacy, both made in the matter of the lunacy, appointing committees; an order on the petition of the committees that the Masters in Lunacy should settle and approve a proper conveyance of the estate comprised in the agreement to the petitioners or some other proper parties, in trust for Sir Henry Meux, his executors, administrators, and assigns, with a declaration that the estate was to be considered as part of the personal estate of Sir Henry Meux, and with powers of sale, exchange, and leasing, with the provision that during the continuance of the unsoundness of mind of Sir Henry Meux and until the proceedings in the matter should be superseded, such powers were not to be exercised without the approval of the Lord Chancellor or the Lords Justices of Her Majesty's Court of Appeal entrusted by virtue of the Queen's sign manual with the care and commitment of the custody of idiots and lunatics and their estates; that the Masters in Lunacy had settled and approved of those presents as a proper conveyance to be executed in pursuance of the last recited order, and an order that the agreement should be carried into effect on behalf of Sir Henry Meux; and the indenture witnessed that in pursuance and performance of the agreement and in consideration of the sums of 225,000*l.* and 7357*l.* 9*s.* 10*d.* sterling (being the price of timber), paid to the vendor out of a fund standing to the credit of the matter of Sir Henry Meux, Baronet, a person of unsound mind, and which fund formed part of the personal estate of Sir Henry Meux, the vendor conveyed the manor, lands, and hereditaments thereinafter particularly mentioned, with the appurtenances, unto and to the use of the committees their heirs and assigns, for ever, upon trust for Sir Henry Meux, his executors, administrators, and assigns; and certain powers of leasing and sale were given to the trustees over the hereditaments; and it was thereby declared that the manors, advowsons, hereditaments, and premises thereinbefore expressed to be thereby granted, were to all intents and purposes to be considered as part of the personal estate of Sir Henry Meux.

Sir Henry Meux died on the 1st of January, 1883. By his will dated the 8th of August, 1856, and a codicil dated the 3rd of July, 1857, he had made certain dispositions of his real estate and also of his personal estate, and the will and codicil were duly proved by the defendants, the executors therein named. Pursuant to the Customs and Inland Revenue Act, 1881, the defendants made an affidavit on applying for probate as to the amount of the personal estate, but in such affidavit they did not include the value of the herein-before mentioned investments, except the first and third, which they did include.

The information prayed that it might be declared that the value of the land and hereditaments, purchased as aforesaid, with funds forming part of the personal estate of Sir Henry Meux, deceased, during his lunacy, by way of investment, was part of the personal estate and effects of Sir Henry Meux at his decease, and liable, under the Customs and Inland Revenue Act, 1881, to duty as part of the estate and effects in respect of which probate of his will was granted to the defendants.

The answer of the defendants submitted that the property comprised in the conveyances was real estate of Sir Henry Meux, and so remained at the time of his death, and that it was not liable to duty as alleged. The defendants also insisted that they ought not to have paid duty in respect of the money invested in the first and third purchases of land, and claimed a return of the duty so paid.

March 12. *Sir H. James, A.G.*, and *F. Vaughan Hawkins*, for the Crown. In two cases it has been admitted that the form of the deed of conveyance gives the land purchased the character of personalty. But all the sales were carried out under similar orders, and the mere omission of a direction for the sale of the land cannot operate so as to make a distinction between the investments, so that two should be treated as personal property and the rest as realty. The rule is that the Court in cases of lunacy will not change the property of a lunatic, nor effect any alteration as to the succession to it: *Awdley* v. *Awdley* (1): *Ex parte Annandale* (2); *In re Badcock.* (3) In these cases money was invested in the purchase of land, but *In re Pares* (4) is a converse case, and there the proceeds of the sale of land were treated as land for the purpose of devolution. The Lords Justices sitting in Lunacy found this property personalty, and they would do nothing to alter the character which the lunatic from his position could not do. If they acted otherwise they might be depriving one class of beneficiaries under a will, or of next of kin under an intestacy, and conferring the property upon another class. The cases shew that a de facto change in the character of the investment is not enough to alter the devolution of the property, and that the effect of a change, not only with regard to devolution, but also with regard to fiscal matters, must be looked at: *Attorney General* v. *Hubbuck* (5); *Attorney General* v. *Brunning* (6): *Advocate General* v. *Anstruther.* (7) Lastly, if it is necessary to argue it, there is in the conveyances an implied trust for reconversion of the land into money, which would preserve to the investment the character of personalty: Lewin on Trusts, 7th Ed., 397; *Tait* v. *Lathbury.* (8)

Horace Davey, Q.C., and *Arthur Leach*, for the defendants. The true construction of the deed is that to whomsoever the property went it was to go as land and not as money. The only way to convert realty into money is by an imperative trust for sale. The question is as to land which belonged to the testator at the time of his death. We are not now concerned with who takes that land, but it is clear that there is no equity existing in anyone to call for the reconversion of this land into money. Supposing Sir Henry Meux had recovered, having the equitable fee in him, he could have demanded a conveyance of the legal estate, and he could have disposed of the property, and it would have passed under his will as real estate. This shews that there is no personal character about it. The estate would remain in the trustees until there was someone entitled to ask for a conveyance of it. This is in fact the deed of Sir Henry Meux, and a man cannot change the nature of property by a declaration, but only by using apt words: *Attorney General* v. *Mangles.* (1) If the next of kin were to take this property as if under an intestacy, they would take it as real and not personal estate: *Curteis* v. *Wormald.* (2) Then it is said there is an implied trust for sale and conversion of the land, but such an implication is negatived by the express powers contained in the deed. In order to subject land on devolution to probate duty there must be an obligation to convert, such as a binding contract, or some direction to be carried out independently of the will of the owner: *Matson* v. *Swift* (3); *Attorney General* v. *Brunning.* (4) Here, if the settlor had recovered it would have depended on him whether the sale and conversion should take place. Looking at Sir Henry Meux's will, which was before the Court that made these orders, it is clear that as the eldest son takes the residue, real and personal, it is immaterial in which form he takes, and no trust for conversion will be implied, which is beyond the necessities of the case. The rule that the Lords Justices in Lunacy will not change the character of the property of the lunatic is obsolete if it ever existed, and such changes are now made for the benefit of the lunatic and his estate: *Ex parte Phillips* (5); *Oxenden* v. *Compton* (6); *In re Barker* (7); *In re Freer.* (8) Under the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), s. 119, when land is sold or charged the surplus money retains the nature of the estate, but nothing is said of money invested in the purchase of land. The inference is that in such a case no power exists to treat the money as unconverted. The Lords Justices have only power to act in the interest of the lunatic, and could not, to protect remaindermen or for any other purpose, make such an order, and the clause in the deeds is of no effect.

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(1) 2 Vern. 192.
(2) Amb. 80.
(3) 4 My. & Cr. 440.
(4) 12 Ch. D. 333.
(5) 13 Q. B. D. 275.
(6) 8 H. L. C. 243.
(7) 13 Sc. Sess. Cas. (2nd ser.) 450.
(8) Law Rep. 1 Eq. 174.

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(1) 5 M. & W. 120.
(2) 10 Ch. D. 172.
(3) 8 Beav. 368.
(4) 8 H. L. C. 243.
(5) 19 Ves. 118.
(6) 2 Ves. 69.
(7) 17 Ch. D. 241.
(8) 22 Ch. D. 622.

Sir H. James, A.G., in reply.

Cur. adv. vult.

March 20. The judgment of the Court (Mathew and Smith, JJ.) was read by

Smith, J. The question in this case is whether the sum of about a million sterling which was formed out of the accumulations of the personal estate of the late Sir Henry Meux after he became lunatic, and was invested in the purchase of land, is or is not liable to probate duty.

On the 17th of June, 1858, under an order of the Lords Justices sitting in Lunacy, Sir Henry Meux was found to be of unsound mind, and the Marquess of Ailesbury and another were appointed committees of his estate. Prior to his becoming insane Sir Henry Meux had, as appears from the statement of counsel in the course of the argument, executed a will, by which he declared, amongst other things, that all accumulations which might accrue from his personal estate were to be invested in Consols and other stocks, and were to be considered part of his residuary personal estate. By this will his eldest son was made residuary legatee of the personalty and devisee of the realty.

Between the 17th of June, 1858, and the date of the death of Sir H. Meux, the accumulations of his personal estate were paid into court to the credit of his estate, and from time to time, upon petition of the committees, the Lords Justices of Appeal sitting in Lunacy ordered that such accumulations should be invested in the purchase of lands, and that the Masters in Lunacy should settle and approve of proper conveyances in that behalf, and declared that the lands so purchased should be considered as part of the personal estate of the lunatic, and that the conveyances should contain powers of sale, exchange, and leasing usual in cases of settlement of real estate. Pursuant to these orders, estates were from time to time purchased by the committees by means of the accumulations above-mentioned, and conveyances of such estates were accordingly settled and afterwards approved by the Masters in Lunacy.

Certain of the estates so purchased were conveyed to the committees, their heirs and assigns, to the use of the committees, their heirs and assigns, upon trust for Sir Henry Meux, his heirs and assigns for ever, and in these conveyances there were contained declarations of the committees that the lands conveyed should be vested in them upon trust to raise the purchase-moneys as therein mentioned, and to pay the same when levied to Sir Henry Meux, his executors, administrators, and assigns. As to the portions of the accumulations which were so invested, no question arose. Probate duty has been paid thereon, and it was not suggested that such moneys, though invested in land, and remaining so invested at the date of the death of the lunatic, did not form part of his personal estate, and therefore liable to probate duty.

It happened, however, that conveyances in a different form were taken of the other estates purchased by means of the residue of the accumulations pursuant to the orders of the Lords Justices above-mentioned, and it was contended by the defendants that by reason of the forms of such conveyances the accumulations so invested were to be held to be part of the real and not of the personal estate of the lunatic, and consequently not liable to probate duty. It was argued for the Crown that a rule existed to the effect that the Lords Justices would not vary or change the property of a lunatic so as to alter the succession thereto, and the cases of *Awdley* v. *Awdley* (1), *Ex parte Annandale* (2), *In re Badcock* (3), and *In re Pares* (4), were cited in support of this contention. The existence of this rule was disputed by the defendants. It appears to us, however, that the rule does exist; but be that as it may, in our judgment the Lords Justices clearly expressed their intentions in their orders, to the effect that they did not intend to vary or change the property of the lunatic so as to alter the succession thereto, and that the accumulated personal estate of the lunatic to all intents and purposes should be considered as part of his personal, and form no part of his real estate. The accumulations of the personal estate of the lunatic were to be invested in lands solely, as it seems to us, for safe and secure investment until either the lunacy should be superseded or the lunatic die, whichever event should first happen.

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(1) 2 Vern. 192.

(2) Amb. 80.

(3) 4 My. & Cr. 440.

(4) 12 Ch. D. 333.

It was urged by Mr. Davey on behalf of the defendants that the conveyances were alone to be looked at, that they must be construed as if they had been executed by Sir Henry Meux himself when sane, and without reference to the orders made by the Lords Justices sitting in Lunacy, and that by the true construction of the conveyances the property was to be enjoyed as realty and not as personalty, and that such, in fact, was the effect of the conveyances.

He argued that to constitute the property in question personal property at the date of the death of the lunatic, and thereby liable to probate duty, an imperative trust for sale ought to have been inserted in the conveyance itself whereby the realty was to be converted into personalty, and that no such trust was to be found in the present conveyances. That even if an implied trust for sale would suffice, there must be shewn to exist a binding agreement by the testator to sell and convert the land into money, or a direction to sell not dependent upon the election of the testator, and he cited the cases of *Matson* v. *Swift* (1), *Attorney-General* v. *Brunning* (2), and *Attorney-General* v. *Hubbuck* (3), in support of this argument. He also insisted that no implied trust for sale at all could be held to exist in the present case because there were powers of sale contained in the conveyances which negatived the existence of any implied trust. He also argued that a trust is only to be implied when it is necessary, and it could not be necessary in the present case, inasmuch as by the will of Sir H. Meux his eldest son was made residuary legatee of both personalty and realty, and that consequently there was no one capable of calling for a conversion, and that therefore no trust for sale could be implied. These were his contentions.

In the first place, we think that his contention that in this case the conveyances are only to be looked at cannot be maintained.

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(1) 8 Beav. 368.

(2) 8 H. L. C. 243.

(3) 13 Q. B. D. 275.

The deeds recite the orders of the Lords Justices, and proceed to convey as follows: The estates purchased by means of the accumulations to the committees upon trust for Sir H. Meux, his executors, administrators, and assigns, until either the inquisition as regards the lunatic's unsoundness of mind is superseded, or until his death, whichever shall first happen, and until such time the grantees are entrusted with powers of leasing, selling, or exchanging. In our judgment the clear intention, as expressed by the documents, is, that the personalty of the lunatic should continue as personalty, and should never form part of his real estate. We do not doubt that when in a conveyance there is an express trust for sale, or indeed in some cases an implied trust, money though invested in land at the date of testator's death would be held chargeable with probate duty, and this is admitted, yet it by no means follows that it is in such cases only and in none other that moneys so invested are to be held to be personalty and liable to duty. No case was produced to shew that this was so. The principle, upon which as it seems to us the existence of an express or an implied trust for sale has been held sufficient to render moneys invested in land personalty, is that such trusts indicate sufficiently the intention of the person so investing, that his personalty, though invested in land, should remain personalty, and so liable to probate duty. We think that these are not the only ways by which such an intention can be indicated.

Even assuming, as Mr. Davey contends, that there is not such an implied trust for sale as would indicate such intention, yet we are of opinion that the intention is clearly expressed in this case by the order of the Lords Justices and the conveyances consequent thereon. As was said by Lord Murray in the case of *Advocate-General* v. *Anstruther* (1), if the object of the investment is simply to obtain security, and not to change its character from personalty to realty then, though the personalty may be invested in realty, personalty it remains and liable to the fiscal duties as such. In our judgment, the case of *Attorney-General* v. *Mangles* (2) which was pressed upon us, in no way conflicts with this. All that was decided in that case was that that which had been realty and was realty still remained realty, although a testator had made a

(1) 13 Sc. Sess. Cas. (2nd ser.) 453.

(2) 5 M. & W. 120.

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ATTORNEY GENERAL v. MARQUESS OF AILESBURY.

declaration in his will that it should be considered as personalty at his death. Here the subject-matter which was originally personalty was ordered by competent authority to retain its character though invested for a time in land. Why is not an express declaration of equal avail with the implication of intention to be derived from the mere fact of trusts for sale being included in a conveyance? In our judgment it is. A further point was taken by Mr. Leach on behalf of the defendants, though it was not taken or argued by Mr. Davey, which was that the Lords Justices had no power to order and declare that the accumulations to be invested in land should be considered personalty and form part of the lunatic's personal estate. He argued that, inasmuch as by the Lunacy Regulation Act, 1873, s. 119, a power was given to the Lords Justices to order when lands were sold that the proceeds should go to the heir, there being no provision for the converse case, viz., that when personalty was invested in realty the proceeds should go to the next of kin, therefore the Lords Justices acted without authority in making the orders they did, and he also cited *In re Freer* (1) before Chitty, J. The decision in that case in no way supports his proposition.

We do not doubt that the Lords Justices sitting in Lunacy have followed what we understand to have been a long and well-established practice, and certainly one which is sanctioned by the book of practice upon the subject (see Elmer's Lunacy Practice (2)), and we are of opinion that they had full power to do what they did.

In our judgment the accumulations in this case are liable to probate duty, and we give judgment for the Crown, and with costs.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Hunters, Gwatkin, & Haynes.*

(1) 22 Ch. D. 622.

(2) 6th edit. p. 60.

A. M.

[IN THE COURT OF APPEAL.]

1885
April 29.

THE QUEEN *v.* THE JUDGE OF THE CITY OF LONDON COURT AND ANOTHER.

Employer and Workman—Employers' Liability Act, 1880 (43 *&* 44 *Vict. c.* 42), *s.* 6—*County Court—Action of Tort—Stay of Proceedings* (19 *&* 20 *Vict. c.* 108), *s.* 39.

Sect. 39 of the County Courts Act, 1856, entitles the defendant "in any action of tort" where the claim exceeds 5*l.* to a stay of proceedings, upon certain conditions as to giving security for the amount claimed and the costs of trial in one of the superior courts of common law:—

Held, affirming the decision of the Queen's Bench Division, that this section was intended to apply only to actions which could be brought either in one of the superior courts or in a county court, and therefore did not apply to an action under the Employers' Liability Act, 1880, which by s. 6 of that Act must be brought in a county court.

Appeal from the decision of the Queen's Bench Division, reported ante, p. 818, where the facts are fully stated. The action was commenced in the City of London Court to recover damages for personal injuries under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42,) s. 6, and the question was whether the defendants were entitled to obtain a stay of proceedings on giving notice under 19 & 20 Vict. c. 108, s. 39 (1), that they objected to the action being tried in the county court, and giving security for the amount claimed and costs.

(1) By 19 & 20 Vict. c. 108, s. 39, "If in any action of contract the plaintiff shall claim a sum exceeding 20*l.*, or if in any action of tort the plaintiff shall claim a sum exceeding 5*l.*, and the defendant shall give notice that he objects to the action being tried in the county court, and shall give security, to be approved of by the registrar, for the amount claimed and the costs of trial in one of the superior courts of common law, not exceeding in the whole the sum of 150*l.*, all proceedings in the county court in any such action shall be stayed. . . . Provided that nothing herein contained shall prevent the removal of any cause from a county court by writ of certiorari in the cases and subject to the conditions in and subject to which such cause may now be removed."

By s. 6 of the Employers' Liability Act, 1880, 43 & 44 Vict. c. 42: "Every action for recovery of compensation under this Act shall be brought in a county court, but may upon the application of either plaintiff or defendant, be removed into a superior court in like manner and upon the same conditions as an action commenced in a county court may by law be removed."

1885

THE QUEEN *v.* JUDGE OF CITY OF LONDON COURT.

The Queen's Bench Division (Mathew and Smith, JJ.) held that s. 39, did not apply to the case, and that the action must proceed in the City of London Court.

The defendants appealed.

McCall, (*Acland*, with him), for the defendants, urged the same arguments as in the Court below.

Horne Payne, for the plaintiff, was not heard.

BRETT, M.R. There can be no doubt that a prohibition ought not to be granted, and that this appeal must fail. By s. 6 of the Employers' Liability Act, 1880, every action for compensation under the Act—these words of themselves seem to imply that such actions were not maintainable before the Act—shall be brought in a county court. It is evident that before the Act no such action existed; a workman might have brought an action in any one of the cases specified in s. 1, but if the employer defended and the facts were disclosed at the trial, they would have shewn that the plaintiff had no cause of action. The Act, however, invents five new causes of action which are specified in s. 1, and enacts in s. 6, that the remedy for them shall be in the county court. It follows that, the remedy being prescribed in the same statute which creates these new causes of action, no action in respect of them can be commenced in the High Court, and whenever the nature of the case is disclosed, the jurisdiction of the High Court is ousted. Then the section goes on to provide that the action may, upon the application of either plaintiff or defendant, be removed into a superior court. If, therefore, it were removed, the removal would give the superior court jurisdiction to try it, although it would not have had jurisdiction if the action had been originally brought there. But supposing that it is too much to say that these causes of action are new; they are at any rate enumerated, and you have a distinct enactment as to the remedy and the mode in which it is to be pursued. The action is to be brought in the county court, but may, upon the application of either party, be removed into a superior court, "in like manner and upon the same conditions as an action commenced in the county court may by law be removed." This brings into the section the mode of removing an ordinary cause from the county court to the High Court, but it does not introduce the mode of staying the proceedings in the county court, in other words, it does not introduce s. 39, of 19 & 20 Vict. c. 108. And when you have a section so clear as s. 6, of the Employers' Liability Act, 1880, it seems to me impossible to dispose of these actions except by bringing them in the county court or removing them in the manner specified to the High Court. What, then, is the reason for making this experiment? Because it is said that in many cases judges at chambers have refused to remove these actions from the county court to the superior court. If this is all, I should say that in nineteen cases out of twenty, looking at the obvious intention of the Act, the judges have acted rightly. It is not merely because of the amount claimed that they are to remove the case from the county court, it is only if some new question of law is raised, or some very difficult question in the particular case, for instance, as to the way in which the machinery caused the injury. The removal is in the discretion of the judge, and I should think that in his discretion he would, except in very peculiar circumstances, leave the case in the county court. A different construction would cause great hardship to workmen. This appeal must be dismissed with costs.

BAGGALLAY and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Ranger & Burton.*
Solicitors for defendants: *Cope & Co.*

A. P. S.

1885
March 23.

THE QUEEN *v.* THE MAYOR AND TOWN COUNCIL OF WIGAN.

Municipal Corporation—Resignation of Corporate Office—Delivery of Resignation to Town Clerk—Power to withdraw Resignation—Municipal Corporations Act, 1882 (45 *&* 46 *Vict. c.* 50), *s.* 36.

Under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 36,—which enacts that a person elected to a corporate office may at any time, by writing signed by him and delivered to the town clerk, resign the office, on payment of the fine provided for non-acceptance thereof,—the resignation is completed by the delivery of the writing to the town clerk and the payment of the fine, and cannot afterwards, even with the assent of the corporation, be withdrawn.

Rule calling on the mayor, aldermen, and councillors of Wigan to shew cause why a mandamus should not issue directed to them commanding them to declare the office of Henry Ackerley, as councillor for No. 5 or All Saints ward in the borough, vacant, by his resignation pursuant to the Municipal Corporations Act, 1882, s. 36.

It appeared upon affidavit that on the 30th of January, 1885, Mr. Ackerley, then a councillor of Wigan, sent the following letter to the town clerk, together with a cheque for 25*l.* :—

"Dear Sir,—I beg to give you notice that I resign the office of councillor for No. 5 or All Saints ward of the borough of Wigan. In accordance with the Municipal Corporations Act, 1882, I beg to hand you a cheque for 25*l.*, the amount of the fine on resignation.

"(Signed) Henry Ackerley."

Mr. Ackerley's resignation was entered on the notice of the council meeting for the 4th of February, 1885. At the meeting on that day he attended. One of the council moved that he should be allowed to withdraw his resignation, and Mr. Ackerley himself said that he should be glad if he might be allowed to withdraw it. The cheque for 25*l.*, which was the proper amount of the fine, had not been cashed. The meeting was adjourned, and ultimately a resolution was carried to the effect that the resignation should not be accepted, and that the office should not be declared vacant.

Sir F. Herschell, S.G. (*Channell*, with him), shewed cause. The provision as to the mode of resigning a corporate office in s. 36 of the Municipal Corporations Act, 1882 (1), is for the benefit of the councillor who resigns, and it is competent to him to withdraw his resignation before it has been acted upon. The ordinary rule is, that where one person has to take some step which another has to act upon, he may withdraw it before it has been acted upon. There is no evidence that any action had been taken in consequence of Mr. Ackerley's letter, and the Court will not regard it as irrevocable.

R. S. Wright, in support of the rule. The resignation was complete within the terms of s. 36. After the letter had been delivered to the town clerk nothing remained to be done by Mr. Ackerley, and his withdrawal of his letter had no effect. Before 6 & 7 Wm. 4, c. 104, it was thought that it was essential to the validity of the resignation of a corporate office that it should be accepted by the corporation, and s. 8 accordingly dispensed with the necessity of such acceptance: see *Staniland* v. *Hopkins*. (2) But no mode of resignation was prescribed, and this is done by s. 36 of the Act of 1882. The act of resignation prescribed is entirely that of the person resigning—the corporation have no option to refuse it. The fact that the cheque was not cashed is immaterial. It was not objected to as being an irregular payment, it was merely not cashed because the council believed that the resignation might be withdrawn.

Sir F. Herschell, S.G., in reply.

MATHEW, J. This rule must be made absolute. Mr. Ackerley on the 30th of January sent to the town clerk a formal resignation in accordance with the provisions in s. 36 of the Municipal Corporations Act, 1882, and, so far as anybody had the means of knowing, remained in the intention of resigning his office up to the meeting of the council on the 4th of February. At this meeting it was suggested that Mr. Ackerley wished to withdraw his resignation, and that the council had the option of accepting or allowing him to withdraw it. A meeting and several adjournments took place, and ultimately the corporation seem, after taking advice, to have come to the conclusion that the resignation might be withdrawn, so that it became necessary to take these proceedings. In my judgment the resignation of Mr. Ackerley's office had been completed. The only conditions required for the resignation—that a writing signed by the officer should be delivered to the town clerk and that the fine for non-acceptance should be paid—had been fulfilled, and by s. 36, sub-s. 2, after this has been done, the council are forthwith to declare the office to be vacant. It has been argued that there is a general principle that where any person has made a mistake and is desirous of rectifying it, he is at liberty to do so until some other person has altered his position in consequence of the mistake. Assuming this to be so, I am unable to say whether or not any persons may have taken steps in consequence of Mr. Ackerley's resignation, but in any view the construction of s. 36, is quite clear.

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(1) The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 36: (1.) A person elected to a corporate office may at any time, by writing signed by him and delivered to the town clerk, resign the office, on payment of the fine provided for non-acceptance thereof. (2.) In any such case the council shall forthwith declare the office to be vacant, and signify the same by notice in writing signed by three members of the council and countersigned by the town clerk, and fixed on the town hall, and the office shall thereupon become vacant.

(2) 9 M. & W. 178.

SMITH, J. I am of the same opinion. In the previous Act, 6 & 7 Will. 4, c. 104, no mode of resigning a corporate office was prescribed. Sect. 36, of the new Act provides that resignation may be by writing delivered to the town clerk, and where the office holder has duly delivered his resignation the resignation is complete. It is argued that he ought to be at liberty to withdraw his resignation before any one has altered his position in consequence of its having been delivered to the town clerk. But this was not a resignation by mistake or inadvertence: as far as we know Mr. Ackerley intended to resign up to the day when the meeting was held. Then some other person took the initiative, and moved that he should be at liberty to withdraw his resignation, upon which he said that he was quite willing to withdraw it. The council ought then to have declared the office vacant, when Mr. Ackerley might have offered himself for re-election. I may add that it does not seem to me that we are in a position to say whether or not the resignation had been acted upon.

Rule absolute.

Solicitors for prosecution: *Burn & Berridge.*

Solicitor for defendants: *M. W. Peace, Wigan.*

A. P. S.

MELLISS AND ANOTHER *v.* THE SHIRLEY AND FREEMANTLE LOCAL BOARD OF HEALTH.

1885
April 23.

Local Government Acts—Urban Authority—Contract not under Seal—Affixing Seal where Contract partly performed, Effect of—Illegality—Officer concerned in Contract, whether Contract void—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 174, 193.

By s. 174 of the Public Health Act, 1875, every contract made by an urban authority whereof the value or amount exceeds 50*l.* shall be in writing and sealed with the common seal of such authority.

The defendants, an urban authority, by contract not under seal employed the plaintiffs as engineers to perform certain work. The plaintiffs performed part of the work exceeding in value 50*l.*, and then required the defendants to affix their seal to the contract. This the defendants did, believing that it was for the benefit of the ratepayers of the district that the contract should be completed:—

Held, that as part of the work was unperformed when the seal was affixed, and there was consideration for affixing it in the plaintiffs' promise to complete the work, it was competent for the defendants to constitute the contract a good contract under seal, within s. 174, in respect of the work already done, and therefore that the plaintiffs were entitled to maintain their action for the value of that work.

By s. 193, officers or servants employed under this Act by the local authority shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act; and if any such officer or servant is so concerned or interested he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of 50*l.*, to be recovered by any person in the prescribed manner:—

Held, that this section intended to limit the penal consequences of a breach of its provisions to the specified penalties; and therefore that the enactment did not render a contract made by an officer with the local authority void, so as to disentitle him to sue upon it.

Action to recover 530*l.* for work done, services rendered, and money paid by the plaintiffs for the defendants.

At the trial, before Cave, J., without a jury, the facts proved (so far as material) were as follows:—

The plaintiffs, Melliss and Pim, were civil engineers. The defendants were the urban sanitary authority of the district, and the plaintiff, Pim, was their surveyor appointed in 1881 at a salary of 150*l.* a year.

In 1882 the defendants intended to construct large works for better draining their district, and disposing of the sewage; and they were in negotiation with the plaintiffs with respect to employing them as engineers to do the necessary work.

On the 14th of November, 1882, the plaintiffs wrote to the defendants offering to work as joint engineers for carrying out the undertaking, on the terms that the plaintiffs were to receive as remuneration 4 per cent. on the total outlay exclusive of certain incidental services, which were to be charged extra, and of all expenses out of pocket—their accounts to be paid quarterly.

This offer was accepted by the defendants by a letter of the 20th of November, 1882.

Between November, 1882, and October, 1883, the plaintiffs prepared estimates and reports, made plans and sections, attended board meetings, and performed and rendered other work and services for the defendants, exceeding in value 50*l.*, under the agreement between them.

On the 17th of October, 1883, the plaintiff Melliss wrote to the defendants stating that it was usual for engineers acting under a sanitary authority to do so under an agreement sealed by the board; and he inclosed a memorandum of agreement signed by himself and Pim, and a copy of the same, to which he asked the board to affix their seal.

After consideration the defendants affixed their seal to the agreement on the 2nd of November, 1883.

The agreement recited that the defendants were about to carry out works for the drainage and disposal of the sewage of the district; that they had received the plaintiffs' offer contained in the letter of the 14th of November, 1882, to act as engineers for the defendants on the terms stated in that letter, and that the defendants had accepted that offer by the letter of the 20th of November, 1882; and concluded, "the seal of the said local board is in confirmation of such agreement and contract hereby attached this 2nd day of November, 1883, in presence of, &c."

Subsequently the defendants abandoned the scheme recommended by the plaintiffs, who in October, 1884, brought this action.

April 22. *Meadows White, Q.C.*, and *Muir Mackenzie*, for the plaintiffs.

A. Charles, Q.C. (*Crump* with him), for the defendants, at the close of the plaintiffs' case submitted that there should be judgment for the defendants. The plaintiffs cannot recover on this contract, because not made under the seal of the board within s. 174 of the Public Health Act, 1875. The provisions of that section are not to be evaded by ratifying a contract not made under seal by subsequently affixing a seal which is to have a retroactive effect.

[CAVE, J.:—The commission specified in the letter of the 14th of November, 1882, would have been earned if the sewage works had been completed. Was it not competent to the defendants in November, 1883, to say, " You have done so much work, but you are not bound to go on with the contract, nor are we bound to pay you for what you have done; but if you will go on we will agree to pay you, and that agreement shall be under seal, i.e., in a form on which you can recover by action "?]

No; because the contract is framed to secure payment only in the event of the work being carried out in the future. There is no obligation on the defendants to carry out the undertaking.

[CAVE, J.:—But they had the benefit of the work done up to the time that their seal was affixed to the agreement. I think there is a great distinction between a case where part of the work under a contract remains to be done, and there is good consideration for the promise in respect of which the seal is affixed, and a case in which all the work contracted for has been done and the seal is affixed subsequently.]

It is contended that this case is covered by *Hunt* v. *Wimbledon Local Board* (1) and *Young* v. *Corporation of Leamington.* (2) Secondly, Pim was an officer of the board when the contract was made, within s. 193 of the Public Health Act, 1875, and therefore cannot recover.

[CAVE, J.:—That section does not say that the contract shall be void. Suppose one of the officers of a local board was also a shareholder in a gas company, would a contract to supply gas by the company to the board be thereby rendered void?]

(1) 3 C. P. D. 208; 4 C. P. D. 48.

(2) 8 Q. B. D. 579.

The statute is prohibitory as well as punitive. The words of the section, which enacts that officers employed under the Act by the local authority "shall not in anywise be concerned or interested in any bargain or contract made with such authority," are strong enough to render the bargain or contract void. [*Stevens* v. *Jeacocke* (1), *Couch* v. *Steel* (2), and *Atkinson* v. *Newcastle Waterworks Co.* (3) were referred to in the discussion on the second point.]

The defendants' counsel then called witnesses to shew that some of the plaintiffs' charges were excessive.

April 23. CAVE, J. This case raises some important questions, but having had an opportunity of considering them I am able to give judgment at once. The first question is whether the plaintiffs are debarred from recovering on the ground that their contract with the defendants was not made under seal in compliance with s. 174 of the Public Health Act, 1875. I have indicated in the course of the argument what is my view on this point. The facts are these: In November, 1882, the defendants contemplated laying out a large sum of money in draining and improving part of their district, and it became necessary to employ engineers in order to carry out that intention. An arrangement was thereupon made by the defendants with the plaintiffs, Messrs. Melliss & Pim, by which the plaintiffs were conjointly to do the engineering work necessary, and to be paid for it at the rate of 4 per cent. upon the total outlay, with extra payments in respect of some incidental matters. A considerable part of the work was done by the plaintiffs; and in September, 1883, it was suggested to them that they had no contract under seal with the defendants, and therefore were not entitled to recover for the work which had been done. The minutes of the board shew that in consequence of that suggestion the plaintiff Melliss wrote on the 17th of October, 1883, asking the defendants to seal the copy memorandum of agreement which he enclosed; and that agreement was sealed by the board on the 2nd of November, 1883. The agreement recites the plaintiffs' offer contained in the letter of the 14th of November,

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(1) 11 Q. B. 731.

(2) 3 E. & B. 402.

(3) 2 Ex. D. 441.

1882, and the defendants' acceptance of that offer by the letter of the 20th of November, 1882, and goes on to state that the seal of the local board "is in confirmation of such agreement and contract hereby attached."

I am of opinion, looking at the peculiar circumstances of the case, that this constituted a perfectly good agreement authenticated by the seal of the board. The effect of the transaction seems to be this: The plaintiffs, finding that they were not protected by any contract under seal, and that while on the one hand they were not compellable to go on with the work, on the other they were not entitled to any remuneration for the work they had already done, made a bargain with the defendants to go on with the work under the contract in consideration that the defendants would give a contract under seal to cover both the past and the future work. Whatever the result in point of law might be if the seal had not been affixed until all the work under the contract had been done (upon which I offer no opinion), it appears to me that whilst the contract was still open it may be fairly contended that it was to the defendants' advantage that the contract should be carried out in its integrity, and if so, that it was competent to the defendants to affix their seal and make the contract good. If it were shewn that the contract had been entered into, not for the advantage of the ratepayers of the district, but for the purpose of putting money into the hands of the engineers, or for some other indirect motive, those facts would perhaps make all the difference. But I come to the conclusion as a fact that this contract was honestly made, and the defendants' seal affixed in the belief that it was to the interest of the ratepayers that the work which remained to be done should be completed, and that the plaintiffs should be paid for the work they had already done when the seal was affixed. I also come to the conclusion that in fact the course taken by the defendants in affixing their seal in order to have the contract carried on was for the benefit of the ratepayers. I am, therefore, of opinion that this was a good and binding contract under seal of the board.

The second point argued for the defendants was that the plaintiff Pim was an officer of the board, and prohibited by s. 193 from being concerned in any contract made with the board. Now whether Pim did or did not come within the scope of that section it is not necessary for me to consider; because, even if he did, I have come to the conclusion that s. 193 does not operate to make the contract void. There is very little authority upon the point (1), but the general rule of construction seems to be this: when the legislature has prohibited a thing from being done under a penalty, you must look at the purview and surrounding sections of the Act in order to see whether the effect of the prohibition is to render the act done void, or whether the legislature intended that the penalty for doing it should be confined to that expressly declared by the statute. Now no doubt considerations of public utility may very usefully be taken into account in approaching this question. The case of *Foster* v. *Oxford Railway Co.* (2) bears slightly on the matter. The decision was upon s. 85 of the Companies Clauses Consolidation Act, 1845, which enacts that no person interested in any contract with a company shall be capable of becoming a director, and no director shall be capable of being interested in any contract with the company during the time he shall be a director; and s. 86 enacts that if any director at any time subsequently to his election be directly or indirectly concerned in any contract with the company, the office of such director shall become vacant, and thenceforth he shall cease from voting or acting as a director. The question raised was whether the contract, which had been made by a director with the company, thereupon became void. Jervis, C.J., said that there was no doubt that the mischief pointed out in argument, viz., that the interests of the shareholders might suffer if a director were permitted to be in a position to use his influence for his own personal advantage, was that which moved the legislature to make the provisions in question. "But," he said, "we cannot, in order to carry their intention more completely into effect, impose a larger penalty than they have thought proper to affix. . . . Mr. Gray says that that section makes all contracts in which a director is interested void. The quantum of interest will not affect the question. If, therefore, all such contracts are void, contracts entered into with a joint stock company, as well as

(1) See *Barton* v. *Piggott*, Law Rep. 10 Q. B. 86.

(2) 13 C. B. 200.

contracts entered into with individuals, would be avoided if a member of the joint stock company happened to be a director of the company contracted with." Having regard to the consequences which would result from such a construction, the Court came to the conclusion that the director ceased to be a director, but the contract was not void. The same results would follow wherever a contract was made by a company with a local board, and one of the members of the company was an officer or servant of the board. Such a contract has been held to be within the mischief of s. 193 (1), and, were it void, consequences of a most serious character would follow. Directors of a company could never make a contract with a local board without going into an inquiry whether one of their shareholders had not some small disqualifying interest as a servant of the board. The consequences of holding that the contract was void would be so tremendous, and the penalty so out of proportion to the offence, that it would require strong language in the Act to make me come to the conclusion that the legislature intended those consequences. The interest of the shareholder in the contract might be infinitesimal, but by reason of it the local board would be enabled to get their coals or gas from the company for nothing, and it is difficult to see how the company could avoid that result without an undue and disproportionate amount of trouble. On the other hand, s. 193 does impose a substantial penalty upon an officer concerned in a contract made with the board. He is disqualified from holding or continuing in any office under the Act, and is made liable to pay 50*l.* It is said that the penalty might be wholly inadequate to the offence, if the contract was a large and important one. There might be cases in which the penalty would be inadequate, but it does not follow that the legislature has thought fit to provide against all possible cases. When one considers the position of the officers of a local authority—such as surveyors and the like—it does not seem likely that they would be concerned in transactions of such an important character as to render the sum of 50*l.* an inadequate penalty for the protection of the ratepayers. I am therefore of opinion that the effect of s. 193 is not to make the contract void.

(1) See *Todd* v. *Robinson*, ante, p. 739.

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In the result the learned judge gave judgment for the plaintiffs for 378*l*.

Judgment accordingly.

Solicitors for plaintiffs: *Keen, Rogers, & Co.*

Solicitors for defendants: *Lamport & Trimnell, Southampton.*

W. A.

March 27.

HURST v. TAYLOR AND ANOTHER.

Negligence—Liability—Highway—Diversion—Owner of Land—Duty to fence.

A duty is cast upon those who, in the exercise of statutory powers, divert a public footpath, to protect, by fencing or otherwise, reasonably careful persons using the footpath from injury through going astray at the point of diversion.

ACTION to recover damages for personal injury alleged to have been sustained by the plaintiff through the defendants' negligence.

At the trial, before Day, J., and a jury, at the Manchester Summer Assizes, 1884, the material facts proved in evidence or admitted were as follows:—

The defendants were contractors employed by a railway company to construct a new line. The private Act of Parliament under which the new line was being constructed, authorized the railway company to divert footpaths for that purpose. No portions of the Act were relied on by counsel as containing any direction with respect to the mode of diversion, or any limitation upon the power to divert. The Act incorporated the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20).

The new line crossed an ancient public footpath and a highway which ran in a direction nearly parallel with the footpath. The footpath ran over an open moor and was unfenced. The highway was distant about eighty feet from the footpath at the points where the new line crossed, and as the land sloped downwards from the footpath towards the highway, the line was carried over the highway by means of embankments and a bridge with abutments. The defendants, exercising, as was conceded, their statutory right, diverted the footpath at a short distance from the new line, substituting for the old part of the path which the line had cut across, a new path running on to the highway.

The plaintiff, about 9 P.M. on the 19th of January, 1884, left a friend's house to return home by the footpath. The night was dark. On arriving at the place where the diversion had been effected, instead of taking the new and substituted path she walked along the old footpath on to the railway, and having proceeded for a short distance on the line, fell over one of the abutments of the bridge, and was severely injured. The evidence given for the plaintiff shewed that there was nothing to prevent persons using the footpath from continuing along the old part instead of diverging at the place where the new part began, and nothing to indicate to strangers the point of deviation, and that a person might well on a dark night continue along the old part of the path on to the railway land.

Day, J., nonsuited the plaintiff on the ground that there was no evidence for the jury of any negligence on the defendants' part.

It was agreed between the parties that, if there was any evidence for the jury in support of the plaintiff's case, judgment should be entered for her for 70*l*.

C. A. Russell, for the plaintiff, moved to set aside the nonsuit, and enter judgment for the plaintiff. It was the defendants' duty to fence the footpath at the place where it deviated from the old path, so as to protect persons reasonably using it from injury. This is not a case of nuisance, but of negligence in the performance of a legal duty. The defendants' obligation comes within the terms of the proposition enunciated by Brett, M.R., in *Heaven* v. *Pender* (1), that, "whenever one person is by circumstances placed in such a position with regard to another, that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." Here there was evidence for the jury that persons using the footpath might well, owing to its condition, come to harm on a dark night at the place of diversion. The case, therefore, ought to have been left to the jury.

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(1) 11 Q. B. D. at p. 509.

Moorsom, and *W. Wills,* for the defendants. The nonsuit was right. There is no obligation on the owner of land near a highway, to fence the land for the protection of persons using the highway, unless the dangerous point be either on the highway, or so near thereto as to be substantially the same thing, and whether the point be dangerous or not is for the judge, and not the jury: *Barnes* v. *Ward* (1); *Jordin* v. *Crump* (2); *Hardcastle* v. *South Yorkshire Railway and River Dun Co.* (3); *Wilkinson* v. *Fairrie.* (4) That case is stronger than this, because there was a distinct invitation to the porter to go along the passage. There was no duty on the defendants here to fence the dangerous point. The principle upon which all the above decisions proceeded should be applied.

[They also referred to *Davey* v. *London & South Western Ry. Co.* (5)]

MANISTY, J. I have come to the conclusion that there was evidence for the jury in this case. The question which lies at the root of the case is whether or not, where a person exercising statutory rights diverts a public footpath, shutting up part of it and substituting a new path for that part, there is a duty on him so to construct the diversion that the public may use the footpath in its diverted condition with reasonable safety. I am of opinion, as a matter of law, that the duty of taking reasonable care to protect the public is cast upon the person who is exercising the statutory right to divert. In that respect this is different from the question whether there is any obligation to fence an old way long dedicated to the public. It is a question of fact for the jury whether or not due and reasonable care was taken to protect the public, who use the new footpath, from straying. I think there was some evidence that reasonable care was not taken, and that a person using the footpath in the dark might well go on towards

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(1) 9 C. B. 392.

(2) 8 M. & W. 782.

(3) 4 H. & N. 67.

(4) 1 H. & C. 633.

(5) 11 Q. B. D. 213; 12 Q. B. D. 70.

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the railway along the old part of the path. Whether the plaintiff was under all the circumstances guilty of contributory negligence is a question for the jury. I am of opinion that the nonsuit was wrong.

LOPES, J. This case raises a novel point upon which there is no authority, but which can, I think, be decided upon general principles of law applicable to negligence. The law appears to me this: if a reasonably careful man might go astray in the dark at the point of diversion, then a duty is imposed upon those who under statutory powers have diverted the path, to use reasonable means to protect the public at that point. I think two questions should have been left to the jury upon this part of the case: first, was the place at the point of diversion a place where a reasonably careful man might go astray on a dark night? secondly, if it was, did the defendants use reasonable care to protect the public at that point?

On both those questions I think there was evidence upon which the jury might, though I do not say they should, answer in the plaintiff's favour. In determining whether the nonsuit was right, the evidence in support of the plaintiff's case only must be looked at. I am of opinion that there was evidence for the jury in support of her case, and therefore that the nonsuit was wrong.

Motion granted.

Solicitors for plaintiff: *Bolton, Robbins, Busk, & Co., for J. Bradbury, Ashton-under-Lyne.*

Solicitors for defendants: *Buckley & Miller, Staleybridge.*

W. A.

1885
April 29.

[IN THE COURT OF APPEAL.]

EDWARDS *v.* HOPE.

Practice—Set-off for Damages or Costs—Solicitor's Lien—Cross Judgments in Separate Actions—Order LXV., r. 14.

The Court, upon an application to set-off cross judgments in distinct actions are entitled, notwithstanding Order LXV., r. 14, to order that the set-off shall be subject to the lien for costs of the solicitor of the opposite party—for assuming that rule 14 applies to a set-off in distinct actions, it leaves the Court a discretion to allow the set-off, either subject to or notwithstanding the solicitor's lien, and if it has no application the Court have the same discretion by the practice previous to Reg. Hil. Term, 1853, r. 63, which, since the repeal of that rule by the new rules, is revived.

MOTION on appeal from an order of Smith, J., at chambers.

It appeared that in July, 1884, upon the trial of an action brought by the plaintiff against the defendant for the price of goods sold, the jury found that credit had not expired when the action was brought, and there was judgment for the defendant. On the 31st of July the plaintiff commenced a fresh action for the debt, and in September recovered judgment for the amount with costs, making together 70*l.* The defendant's costs in the first action having been taxed at 48*l.* 8*s.* 10*d.* against the plaintiff, an order was obtained from the master, upon the application of the plaintiff, that he might be at liberty to set off against the defendant's judgment an equivalent part of the unsatisfied judgment for 70*l.* The defendant appealed, upon an affidavit by his solicitors that the set-off would destroy their lien for costs incurred in the first action, and Smith, J., varied the order by making the set-off subject to the solicitors' lien.

March 20. *J. H. Etherington Smith,* for the plaintiff. Under Rules of 1883, Order LXV., r. 14, "a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." The set-off ought to have been allowed without regard to the solicitor's lien. The rule applies to a set-off in distinct actions, as in the present case. The words "costs in the particular cause or matter," mean costs due to the solicitor in the cause or matter in which the opposite party has obtained judgment, as distinguished from costs due to him in respect of other matters. If the rule were limited to a set-off in the same action, it would have been unnecessary, for Reg. Gen. Hil. Term, 1853, r. 63, "No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought," goes on, "provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted." So that when the new rules were made, cross judgments in the same action could be set off without regard to the solicitor's lien. This further appears from *Newton* v. *Newton* (1); *Alliance Bank* v. *Holford.* (2) The late Master of the Rolls in *Pringle* v. *Gloag* (3) had occasion to consider Reg. Hil. Term, 1853, r. 63, and he observes upon the injustice of allowing the solicitor's lien to prevail when the opposite party has substantially succeeded, and at the same time points out that even at Common Law a debt or damages in one action may be set off against costs in another action. Rule 14, was probably framed in consequence of these observations, with the object of removing the previous restrictions, and giving the Court in all cases of set-off a discretion to supersede the solicitor's lien.

H. Tindal Atkinson, for the defendant. The Court has no power to interfere with the solicitor's lien in the action against which the set-off is sought. Rule 14, has reference to cross-claims for damages in the same action, and power is given to the Court in such cases to set-off the judgments against each other without reference to the solicitor's lien. At the date of Reg. Gen. Hil. Term, 1853, rule 63, cross-claims for damages could only be set up in different actions. The Judicature Acts having introduced counter-claims, it was thought necessary to make further provision as to setting off judgments in the same action, but it was not intended to affect the solicitor's lien where the cross-judgments are in two separate actions. The observations of Jessel, M.R., in *Pringle* v. *Gloag* (3) have no reference to separate actions, and he

(1) 8 Bing. 202.

(2) 16 C. B. (N.S). 460.

(3) 10 Ch. D. 676.

merely insists upon the injustice of allowing the solicitor to assert his lien in an action in which his client has substantially failed.

LOPES, J. I think that the order of Smith, J., was right. By Order LXV., r. 14, "a set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." Does that rule apply to damages and costs in the particular cause or to damages and costs in independent actions? I think it only applies to the cause, and that the object of that rule was to remedy what was thought to be a defect in rule 63 of Hil. Term, 1853, viz., "No set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted." In my opinion, the construction of rule 14, by Smith, J., was right. It appears to me that it applies to the same subject-matter,—viz., damages and costs in the particular suit—that Reg. Gen. Hil. Term, 1853, r. 63, applied to. But assuming that our construction of Order LXV., r. 14, is incorrect, and that it gives powers to supersede the solicitor's lien, the question is whether the discretion of the learned judge was rightly exercised. In my opinion it was. I cannot see that the solicitors in this case have done anything which justifies us in coming to the conclusion that they ought to forfeit their costs. They recovered judgment in the first action. If they had been prompt they might have had their costs taxed and paid before the judgment in the second action. It would be very hard if, under the circumstances in this case, we were to deprive them of their costs.

CAVE, J. I am of the same opinion. It appears, from the judgment of James, L.J., in *Ex parte Griffin, In re Adams* (1), that Lord Eldon, in *Hall* v. *Ody* (2), expressed his surprise at finding that it was the practice of the Court of Common Pleas that the attorney should not take his costs out of the fund which by his diligence he recovered for his client, where the opposite party was entitled to a set-off. It appeared from this judgment that there was a practice of the Courts of Common Law, in the exercise of that jurisdiction which every Court has over its own proceedings, to allow one judgment to be set off against another by means of entering satisfaction of the smaller judgment in pro tanto satisfaction of the larger judgment. The practice does not seem to have been uniform whether, in so doing, regard would be had to the solicitor's lien for costs. It would appear from Lord Eldon's judgment that the practice of the Common Pleas in his time was to allow the set-off without reference to this lien. It does not appear to have been the practice of all Courts, and certainly not of the Court of Chancery. I agree with the interpretation of rule 14 by Lopes, J., and that it does not apply here, and does not interfere with the previous practice. But even if we held that it did interfere with the previous practice, it does not do so to the extent of saying that the contrary practice shall prevail, but merely leaves it open to the Court to say what is equitable. Then what does equity require here? It is, of course, for the plaintiff, asking for equitable interference, to shew that equity is in his favour, and when I read what Lord Eldon says in *Hall* v. *Ody* (1), and Lord Justice James says in *Ex parte Griffin* (2), I am quite clear that in a case like the present the equitable considerations are not at all in favour of the set-off. There was an action brought which the verdict shews ought not to have been brought, and was wrongly and unsuccessfully brought, and the defendant got judgment for her costs, and as soon as she got judgment for her costs, the lien of the solicitors attached, and probably, if they had used due diligence, they might have got their costs in the first action long before judgment in the second action, and undoubtedly the second action would not have been allowed without payment of the costs of the first. Under these circumstances, is there any equity? I think there is none at all. The balance of equity is in favour of allowing the solicitors' lien to operate, and not to destroy it. I think the order of the learned judge was right, and that the application must be dismissed with costs.

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(1) 14 Ch. D. 37.

(2) 2 B. &. P. 28.

Motion dismissed with costs.

J. R.

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(1) 2 B. & P. 28.

(2) 14 Ch. D. 37.

The plaintiff appealed.

April 29. *J. H. Etherington Smith,* for the plaintiff.

H. Tindal Atkinson, for the defendant.

The arguments were the same as in the court below.

Brett, M.R. I am of opinion that this judgment must be affirmed. Under the old practice in the common law courts no question as to setting off damages in the same action could arise, and it is only since the introduction of counter-claims that such a set-off is possible. The Courts, however, always had an equitable jurisdiction, for the purpose of preventing absurdity or injustice in cases where there had been judgments for damages between the same parties in distinct actions, to set-off one judgment against the other and to allow execution to issue in respect of the balance only. In allowing this set-off in cross actions the Courts of Exchequer, Queen's Bench, and Common Pleas once had a different practice with regard to the solicitor's lien, and the object of the Rule of Hilary Term was to render the practice of the three Courts in this respect uniform. The late Master of the Rolls had to consider the practice after the Judicature Acts came into operation, in *Pringle* v. *Gloag* (1), where the application was to set off a debt against costs, both of which were due under the same award, and he points out the injustice which would result if the assertion of the solicitor's lien caused the successful party to pay the losing party's costs. What he says would apply to this case if the claims were in the same action instead of being in distinct actions. But however this may be, Order LXV., r. 14, supersedes the old practice under R. G. H. T. 1853, r. 63. Rule 14, says that a set-off for damages or costs between parties may be allowed, notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought. Whether this rule does or does not apply to cases where the set-off is claimed in different actions the same results follow. If it does, the Court has a discretion whether or not it shall allow the set-off. If it does not, the old practice before the rule of 1853 remains, by which the Court had a discretion to order what it considered just with regard to the solicitor's lien. In the present case the Court has exercised its discretion and allowed the solicitor's lien, and I think this was just and equitable, and that this order must stand.

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(1) 10 Ch. D. 676.

Baggallay, L.J. I am of the same opinion. It is unnecessary to decide whether rule 14 of Order LXV., or the 37th sub-s. of rule 27 of the same order, gave the Court a discretion to protect the solicitor's lien where the set-off is claimed in distinct actions. If it were necessary to decide whether Order LXV., r. 14, applies to a set-off in respect of distinct and separate actions I should wish for more time to consider the question. But if it does not apply the practice before any rules were made on the subject continues in force and enables the Court to exercise the same discretion as if it actually applied.

Bowen, L.J. I am of the same opinion. The Courts before the present rules had an equitable jurisdiction to set off against each other cross judgments in the same action or in different actions and in the same or in different courts. The old practice is explained in Chitty's Practice, 8th ed., p. 625; and it appears that in consequence of a diversity in the practice of the Court of Queen's Bench and that of the other courts, rule 93 of 2 Wm. 4, was passed, which is in the same terms as rule 63 of the Rules of Hilary Term, 1853, and which protected the solicitor's lien where the set-off was asserted in different actions. This rule is swept away by the new rules, and rule 14, of Order LXV. says that a set-off for damages or costs "may" be allowed between parties notwithstanding the lien of the solicitor in the particular cause or matter in which the set-off is sought. It has been argued that this rule does not apply to cross judgments in separate actions; but in whichever way we construe the rule it seems to me that the Court in allowing the set-off is at liberty to impose such terms as it thinks reasonable and just. If we interpret the rule as applying only to a set-off in the same action it has no application to the present case, and rule 63, of Hilary Term, 1853, having been abrogated, the old equitable jurisdiction of the Court is revived. If, on the other hand, rule 14, is taken to apply to a set-off in different actions, the Court, by the express terms of the rule, has a discretion as to the terms on which the set-off is to be allowed. Either way, therefore, the Court below was at liberty to exercise its discretion, and we ought not to interfere unless we can see that this discretion was wrongly exercised, which we certainly can not.

Order affirmed.

Solicitors for plaintiff: *Dubois, Reid, & Williams.*
Solicitors for defendant: *Lindsay, Mason, Greenfield, & Mason.*

A. P. S.

March 21.

SELLORS *v.* THE LOCAL BOARD OF HEALTH FOR MATLOCK BATH.

Local Government Acts—Nuisance—Urinal—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 39, 149, 264, 308—*Compensation—Mandatory Injunction—Public Highway.*

A local board, assuming to act under the authority of s. 39 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), erected a public urinal partly upon a highway and partly upon a strip of land belonging to the plaintiff, and so near to other adjoining land of the plaintiff as to be a nuisance to her and her tenants and to depreciate the value of her property :—

Held, that the plaintiff was entitled to a mandatory injunction to restrain the board from continuing the urinal upon her land or so near thereto as to cause injury or annoyance to her or her tenants:

Held also, that it was not a matter in respect of which the plaintiff's remedy was by compensation under s. 308 of the Act.

In such a case notice of action under s. 264 is not required.

Abutting upon the highway the plaintiff had land upon which an inn and some stabling were erected. These stood back from the highway, and in front of them was an open space (forming part of the same land) which had been left open to and on a level with the highway until the defendants in exercise of their powers under s. 149 of the Act, and for the convenience of the public, placed kerb-stones and a raised foot-path at the side of the highway, leaving openings so that carriages could still pass at convenient places to and from the plaintiff's land and premises :—

Held, that the plaintiff was not entitled to a mandatory injunction directing the defendants to remove the kerb-stones, and that in the absence of any unreasonable conduct the remedy for any injury caused by the kerb-stones would be by compensation under s. 308 of the Act.

ACTION for an injunction to restrain the continuance of a nuisance by erecting a public urinal upon a highway adjoining land and premises belonging to the plaintiff, and to restrain the continuance of certain kerb-stones erected on the highway so as to obstruct the entrance to the plaintiff's premises at some portions of her frontage.

The cause was tried before Denman, J., at the last assizes at Derby, when the entry of judgment was reserved for further consideration. The facts can be sufficiently collected from the judgment.

March 14, 1885. *Dugdale, Q.C.*, and *Appleton*, for the defendants. If this be, as it is submitted it is, substantially an action for a trespass, the board were entitled to a notice of action under s. 264 (1) of the Public Health Act, 1875, though it seems it is otherwise if it be substantially a claim for an injunction only: *Flower* v. *Low Leyton Local Board.* (2) The 39th section enacts that any urban authority may, if they think fit, provide and maintain, in proper and convenient situations, urinals, waterclosets, &c., and other similar conveniences for public accommodation; and s. 308 provides the appropriate remedy for any damage to individuals. (3) The case of *Vernon* v. *St. James, Westminster* (4), which will be relied on for the plaintiff, is distinguishable, on the ground that the Act of 1855 (18 & 19 Vict. c. 120) did not contain a clause for compensation in the large terms of s. 308 of the

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(1) "A writ or process shall not be sued out against or served on any local authority, or any member thereof, or any officer of a local authority or person acting in his aid, for anything done or intended to be done or omitted to be done under the provisions of this Act, until the expiration of one month after notice in writing has been served on such local authority, member, officer, or person, clearly stating the cause of action and the name and place of abode of the intended plaintiff and of his attorney or agent in the cause: and on the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice so served: and unless such notice is proved the jury shall find for the defendant:

"Every such action shall be commenced within six months next after the accruing of the cause of action, and not afterwards."

(2) 5 Ch. D. 347.

(3) Sect. 308 enacts that, "where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers; and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act [s. 179], or, if the compensation claimed does not exceed the sum of 20*l.*, the same may at the option of either party be ascertained and recovered before a court of summary jurisdiction": see s. 4.

(4) 16 Ch. D. 449.

Act now in question. And see *Mersey Docks and Harbour Board* v. *Gibbs* (1); *Metropolitan Asylum District* v. *Hill.* (2) The evidence shewed that the urinal was a great accommodation to the public, and the situation a proper and convenient one.

[DENMAN, J. Does it not cease to be proper and convenient when it causes a nuisance?]

The local board are the proper persons to determine as to the propriety and convenience of the site for an erection of this kind. It is only in a very strong case, and where there is no other available remedy, that the Court will interfere by injunction: Story's Equity Jurisprudence, § 864; *Goodson* v. *Richardson.* (3) The 91st section of the Public Health Act, 1875, defines a nuisance to be something "injurious to health;" and s. 96 and subsequent sections contain provisions for its abatement: *Scarborough Corporation* v. *Scarborough Sanitary Authority.* (4) As to the kerb-stones, the board, in raising the path in the manner described, were clearly acting within the scope of their authority under s. 149.

Mellor, Q.C., and *W. Graham*, for the plaintiff. The plaintiff does not seek, nor is she bound to do so, damages or compensation for the trespass complained of; but she claims, as she has a clear right to do, an injunction to restrain the board from continuing the existence of an undoubted nuisance, and therefore no notice of action was necessary. There is no pretence for saying that the plaintiff could have any adequate remedy under the clause for compensation in the Act. Sect. 308 only applies where the thing complained of is something done upon a public highway: it cannot give the board a right to commit a trespass upon private property, nor to make such an erection as this even upon a public highway where it will be a nuisance to an adjoining land-owner. The case of *Vernon* v. *St. James, Westminster* (5) is a distinct authority to shew that such an erection as this can only be placed even upon land vested in the local authority where the interests of individuals will not be prejudiced thereby.

Cur. adv. vult.

(1) Law Rep. 1 H. L. 93.
(2) 6 App. Cas. 193.
(3) Law Rep. 9 Ch. App. 221.
(4) 1 Ex. D. 344.
(5) 16 Ch. D. 449.

1885. March 21. DENMAN, J. This was an action for an injunction in respect of two matters of complaint,—first, the erection and continuance of a public urinal said to be erected wholly or partly on the plaintiff's land, and alleged to be a nuisance,—and secondly, the placing and continuing kerb-stones in front of the plaintiff's property, so as to prevent free access by carriages to that property.

The plaintiff is owner in fee of a triangular piece of ground at Matlock Bath. She took under the will of one Pearson, her father, who died in February, 1884. This triangular piece of ground lay between three roads; one (which I will call the base of the triangle) was the main road from Derby to Bakewell, which had been vested in turnpike trustees until the expiration of the trust, which happened at some time in 1868; another was a road running up a very steep hill, and parted from the first-mentioned road and the plaintiff's land by a very high retaining-wall; this formed the upper and left-hand boundary of the triangular piece: the upper and right-hand boundary was another road sloping up towards the same point as the road last described, and joining it, so as to inclose, with the base, a triangle of about 330 square yards, or about eighteen yards square. The triangular piece was exceedingly steep, sloping down to the main road. Originally, a small stream had found its way out of the plaintiff's land into the turnpike road, but the plaintiff's father, Pearson, finding that the water had petrifying powers, had covered over that portion of the slope from which the water trickled into the stream, so as to make a kind of basin or well, for the convenient petrifaction of barristers' wigs and other interesting objects mentioned in the evidence.

There was a conflict of evidence as to the original boundary of the triangle at its base: but I think that the most accurate account of the matter was that given by the witnesses for the plaintiff, and that the following was the state of things:—Pearson bought the land in 1864. At that time it sloped gradually down to the road at the base of the triangle without any clearly defined boundary to separate it from the road. Three or four years afterwards, and more than twelve years before action brought, and when the road at the base was still vested in the turnpike trustees, Pearson cut away some three feet of the slope, and built a stone retaining-wall about three feet high all along the length of the base of the triangle. But he left about three feet in width outside the wall, and put stones into the ground at that distance from the wall so as to mark and with the intention of marking the original boundary of his property as between it and the turnpike-road. He at the same time, instead of prolonging this wall in a straight line until it joined the high retaining wall carrying the road on the left side of his triangular piece, cut off a small acute angle on the left-hand corner of the base by building a short wall turning at an obtuse angle towards the high retaining-wall, thus leaving a small portion of his land outside the wall. The urinal complained of is built partially on this small portion; and, if the three feet outside the plaintiff's retaining wall are still the plaintiff's property, the urinal is almost wholly on the plaintiff's property.

The defendants contended that the plaintiff had no right to any of the land outside the wall, because by the building of the wall he had dedicated the land as a part of the highway to the public. I do not think I can so presume from the evidence in the case. After the building of the wall, there was evidence, which I believe, that for some time, and within twelve years, Pearson had more than once been asked for and granted permission to owners of donkeys to allow their donkeys to stand on the small acute-angled triangular piece outside the retaining wall and its continuation; and it was proved that the stones placed by him to mark the old boundary were continued in their places until a short time before the present disputes arose. The plaintiff's brother swore that he originally placed the stones, by his father's instructions, with the intention of preserving the boundary, and that the object of turning the wall in, instead of continuing it in a straight line, was, to enable steps to be made upon and from the small acute-angled piece up to the ground which was flush with the top of the wall, to give access to contemplated buildings. I am therefore of opinion that there is no ground for holding that the plaintiff's predecessor in title had dedicated the land to the public in such a way as to justify the defendants in treating it as part of the highway. The defendants, therefore, in 1883, erected the urinal mainly or partly on the plaintiff's land.

The plaintiff's evidence has also satisfied me that the urinal is a nuisance of which the plaintiff has a right to complain. In the plaintiff's wall, at a distance of only forty feet from the urinal, is a door, erected by Pearson, which forms the entrance to the petrifying well. Along the whole length of the wall up to the urinal, about six inches outside the original line of stones placed by Pearson, the defendants have laid a line of kerb-stones, raised above the level of the high road and forming the outside of a raised foot-path adjoining the wall, and terminating at the urinal. This urinal projects into the road considerably further than the wall, and is plainly visible from the entrance-door of the well; and the evidence satisfies me that in hot weather, and when Matlock Bath is much crowded with visitors by excursion trains, the urinal creates a serious nuisance injurious to the occupiers of the well; and that, if allowed to remain, it would seriously diminish the value of the plaintiff's land. There was evidence of the tenants of the well and others, which I believe, that persons intending to visit the well had mistaken the odour of the urinal for that of the well itself, and turned away from the door in consequence. It must also be admitted that an erection of this sort, however convenient to one of the sexes, would be proportionately repulsive to the other; and that a raised foot-path ending with such an erection would have a tendency to increase that repulsiveness, by unduly obstructing the path opposite to the door of the well. It was also proved by witnesses on both sides that at times foul liquid had flowed from the urinal down close to the door of the plaintiff's petrifying well. Several highly respectable witnesses gave their opinion that the urinal in question was a great boon to the public; and I have no doubt that it is a great advantage to excursionists, and that the board has been influenced by no improper motive in what it has done in the matter; but I have also no doubt that the urinal in question is erected, partly at all events, on the plaintiff's land, and that it is a nuisance in the sense in which a similar erection was held to be a nuisance in *Vernon* v. *St. James's, Westminster.* (1)

It was contended by Mr. Dugdale, and Mr. Appleton, for the defendants that no injunction could be granted because notice of action had not been given, and because the action had not been brought within six months of the act done, and that s. 264 of the Public Health Act, 1875, applied. But it is now well settled that that section affords no answer to an action for an injunction to restrain a nuisance: *Flower* v. *Low Leyton Local Board* (2): and I cannot draw any distinction between the case of an injunction founded on a trespass or an actionable nuisance, and any other sort of injunction, as I was invited to do.

It was also contended that s. 308 applied, and that the remedy was by compensation, and not by action. This would be so, if the Act contained any powers for the board to erect urinals upon private ground: but there are none. Nor do I think that it can be contended, after the decision in *Vernon* v. *St. James's, Westminster* (1), though decided upon somewhat different language, that the power given by s. 39 of the Act of 1875 to erect urinals in "proper and convenient places" carries with it a right to create a nuisance without being liable to an action. Indeed, I think the language of the section there relied on was more favorable to the local authority than the words of s. 39.

I am for these reasons of opinion that the plaintiff, who was bound to protect the interests of her lessees, is entitled to an injunction restraining the defendants from continuing the urinal upon the plaintiff's land or so near to it as to cause a nuisance to the plaintiff, her tenants or lessees.

As to the rest of the plaintiff's claim, I think it is much less substantial. Besides the triangular piece of land, she has some land and buildings abutting upon the same high road, consisting of an inn and some stables. These stand back from the road, and in front of them is a space which has been left open to and on a level with the road until recently, when the defendants made a foot-path on the road outside the plaintiff's land, with raised kerb-stones, but left openings so that carriages can still go in from, and out into, the road, but not at every part of the

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(1) 16 Ch. D. 449.

(2) 5 Ch. D. 347.

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boundary as heretofore. The plaintiff contended that this was an interference with her right to have access for all purposes to every portion of the highway adjoining her property.

The defendants as to this cause of action relied upon s. 149 of the Act; and I think that that section does give the defendants power to do what they have done. The words are very large, and apply to all "streets being highways repairable by the inhabitants at large." That this is such a highway, I cannot doubt. It was a turnpike-road but the trusts have expired, and it is part of the main road from Manchester to Derby. It is therefore vested in the board, and placed under its control by s. 149. Then, that section provides that "the urban authority *shall* from time to time cause all such streets to be levelled, paved, altered, and repaired, as occasion may require;" and that "they *may* from time to time cause the soil of such street to be raised, lowered, or altered as they may think fit; and may place and keep in repair fences and posts for the safety of foot-passengers." Looking at the whole of the clause together, I think it cannot be contended that wherever any person has land adjoining the road which has remained undistinguished from the road, perhaps for centuries, he can as a matter of course restrain the local authorities from making a raised foot-path for the accommodation of the public on a part of the road which is vested in them, merely because by so doing they may render it impossible for the time, for the owner of the land, to draw up a carriage close to the exact boundary of his land, or to enter his land, at every inch of the boundary.

I am of opinion that this is a case in which the land-owner's remedy, at all events in the absence of any unreasonable conduct on the part of the local authority, is, to claim compensation under s. 308 of the Act. Moreover, I am of opinion in this case that no substantial injury has been done to the plaintiff by the kerb-stones complained of. As to this part of her claim, therefore, I decline to make any order restraining the defendants.

With regard to the costs, I think that they must be paid by the defendants so far as the general costs of the action and the costs of the part upon which the plaintiff has succeeded are concerned: but, so far as the defendants have been put to any costs by resisting the claim for the discontinuance of the existing

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kerb-stones, they must be allowed to set these off against the costs allowed to the plaintiff.

Judgment accordingly.

Solicitors for plaintiff: *Brownlow & Howe, for Brown & Ainsworth, Stockport.*

Solicitors for defendants: *Le Riche & Son, for T. H. Newbold, Matlock, Bath.*

J. S.

Feb. 27.

[IN THE COURT OF APPEAL.]

EX PARTE SALAMAN. IN RE SALAMAN.

Bankruptcy—Order of Discharge—Condition—"Rash and hazardous speculations"—Conduct of Bankrupt before Commencement of Act—Retrospective Effect of Act—Bankruptcy Act, 1883 (46 *&* 47 *Vict. c.* 52), s. 28*—Costs—Appeal.*

Upon an application by a bankrupt under s. 28 of the Bankruptcy Act, 1883, for an order of discharge, the Court may take into consideration conduct of the bankrupt of the nature mentioned in sub-s. 3, though it took place before the commencement of the Act, and in that sense s. 28 is retrospective.

In re White (9 L. T. (N.S.) 702) explained and distinguished.

A solicitor who had no capital of his own bought land in the city of London by means of money which he borrowed on the security of mortgages of the land, his intention being to sell it at an advanced price. He afterwards borrowed more money on a further mortgage for the purpose of building on the land. The land was valued by professional valuers at considerably more than the amount borrowed. He was unable to sell or to let the property, and he became a bankrupt:—

Held, that he had been guilty of "rash and hazardous speculations," and that the registrar was right in granting him an order of discharge subject to the condition that, after setting aside out of his earnings 300*l.* a year for the maintenance of himself and his family, he should pay over to the official receiver the balance of his earnings, until he should have paid 10*s.* in the pound on all the debts which had been, or might be, proved in the bankruptcy.

Creditors served with notice of an appeal by a bankrupt from an order granting him a conditional discharge will not be allowed their costs of appearing on the hearing of the appeal when the official receiver or trustee appears.

APPEAL from an order made by Mr. Registrar Pepys, granting a bankrupt a conditional order of discharge.

J. S. Salaman was a solicitor. On the 4th of August, 1884, a receiving order was made against him on his own petition. By his statement of affairs, made on the 21st of August, 1884, it appeared that he owed to fully secured creditors 56,284*l.* 15*s.* 2*d.*, the estimated value of their securities being 60,284*l.* 15*s.* 2*d.*, leaving a surplus of 4000*l.*; and to partly secured creditors 26,759*l.* 16*s.* 6*d.*, less the above 4000*l.* estimated surplus, leaving a balance of 22,759*l.* 16*s.* 6*d.* This with other unsecured debts brought the total of his unsecured debts to 34,502*l.* 0*s.* 8*d.* He estimated his assets at nil. On the 20th of August an order was made for the administration of the estate in a summary manner pursuant to s. 121 of the Bankruptcy Act, 1883. On the 4th of September, 1884, the debtor was adjudicated a bankrupt, and the official receiver became trustee in the bankruptcy. On the 31st of October the official receiver made a report to the Court as follows:—

"That having regard to s. 28 the official receiver has no reason to believe that the debtor has committed any misdemeanor under this Act, or Part II. of the Debtors Act, 1869, or any amendment thereof.

"That the greater part of the indebtedness of the bankrupt appears to have been incurred in connection with the purchase and rebuilding of the freehold premises No. 16, Tokenhouse Yard, in the city of London, a building speculation which the debtor entered into in January, 1877, without having apparently any capital, and which he carried out with borrowed money.

"That the books which the bankrupt has produced have been imperfectly kept and do not disclose all his transactions in respect of this building speculation, but relate only to his business of a solicitor.

"That the bankrupt has, in addition to his statement of affairs, filed accounts shewing the application and disposal of sums amounting to about 50,000*l.*, part of sums amounting to about 77,759*l.* 16*s.* 6*d.* still remaining due on mortgages of the said premises, but no book or account has been produced to shew the application of the large balance.

"That the bankrupt on his public examination on the 24th of September, 1884, stated that he had lost 1200*l.* or 1500*l.* on the Stock Exchange; that his expenditure for the last three years had been about 600*l.* per annum; that the amount of his income received from his business for the last two years would not he thought amount to more than 500*l.* per annum, and that the difference between that sum and his expenditure was made up by the assistance of friends.

"The official receiver submits to the Court that the bankrupt has been guilty of rash and hazardous speculation.

"That with the above exceptions the official receiver has no reason to believe that the bankrupt has committed any offence under sub-s. 3 of s. 28 of the Act."

On the 4th of November, 1884, the bankrupt applied to the Court for an order of discharge. The registrar granted him an order of discharge, subject to the conditions that he should file annually an account of all his earnings, whether arising from his profession of a solicitor or otherwise, and that, after setting aside for the maintenance of himself and his family out of such earnings a sum of 300*l.* per annum, he should pay over to the official receiver the balance of such net earnings as might from time to time be received by him in cash, until he should have paid 10*s.* in the pound on all debts which had been, or might thereafter be, proved in the bankruptcy.

There was evidence that when the bankrupt purchased the property in Tokenhouse Yard in 1877 for 28,700*l.* and raised the sum of 29,000*l.* upon a mortgage of it for the purpose (inter alia) of paying the purchase-money, the property was valued at 40,000*l.* And when in 1879 he raised the sum of 50,000*l.* by a mortgage of the property for the purpose (inter alia) of paying off the original mortgage, the property was valued at 75,000*l.* by an eminent surveyor employed by a company who advanced the 50,000*l.*, he making, under the Mortgage Debenture Act, 1865 (28 & 20 Vict. c. 78), a statutory declaration as to the value.

Cooper Willis, Q.C., and *Sidney Woolf*, for the appellant. The order of the registrar is erroneous on three grounds:—(1.) Sect. 28 of the Bankruptcy Act, 1883, is not retrospective, that is, in determining whether an absolute order of discharge is to be granted or refused to a bankrupt, or its operation suspended, or any conditions imposed, the Court cannot take into consideration "rash and hazardous speculations" of the bankrupt before the passing or commencement of the Act. (2.) There is no sufficient proof of rash and hazardous speculations. (3.) The condition imposed is harsh and unreasonable.

As to (1.), s. 28 (1) must be construed with reference to the previous enactments on the subject. The Bankruptcy Act, 1869, contained no similar provision, though the Acts of 1849 and 1861

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(1) Sect. 28 provides: "(1.) A bankrupt may, at any time after being adjudged bankrupt, apply to the Court for an order of discharge, and the Court shall appoint a day for hearing the application, but the application shall not be heard until the public examination of the bankrupt is concluded. The application shall be heard in open Court.

"(2.) On the hearing of the application the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs, and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt, or with respect to his after-acquired property: Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under this Act, or Part II. of the Debtors Act 1869, or any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge, subject to such conditions as aforesaid.

"(3.) The facts hereinbefore referred to are—

"(*a.*) That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy:

"(*b.*) That the bankrupt has continued to trade after knowing himself to be insolvent:

"(*c.*) That the bankrupt has contracted any debt provable in the bankruptcy, without having at the time of contracting it any reasonable or probable ground of expectation (proof whereof shall lie on him) of being able to pay it:

"(*d.*) That the bankrupt has brought on his bankruptcy by rash and hazardous speculations or unjustifiable extravagance in living:

"(*e.*) That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him:

"(*f.*) That the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors:

"(*g.*) That the bankrupt has on any previous occasion been adjudged bankrupt, or made a statutory composition or arrangement with his creditors:

"(*h.*) That the bankrupt has been guilty of any fraud or fraudulent breach of trust.

"(4.) For the purposes of this section the report of the official receiver shall be primâ facie evidence of the statements therein contained."

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did. The adjudication in the present case was made under the Act of 1883, but, at the time when the bankrupt engaged in the speculations complained of, he was doing that for which he was not liable to any punishment under the law then in force, and it could not have been intended by the legislature that he should be affected by a subsequent alteration of the law as regards acts committed at a time when they were in no sense unlawful. In *In re White* (1) Lord Westbury held that s. 159 (2) of the Bankruptcy

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(1) 9 L. T. (N.S.) 702; 33 L. J. (Bkcy.) 22.

(2) Sect. 159: "In granting orders of discharge the following rules shall be observed:—

"1. If on the hearing of any application for an order of discharge the assignees or any creditor shall allege, and if with or without such allegation the Court shall be of opinion, that there is ground for charging the bankrupt with acts or conduct amounting to a misdemeanor under this Act, the Court shall, if the bankrupt consent thereto, direct a clear statement in writing of the charge to be delivered to the bankrupt, and shall appoint a day for trying the bankrupt on such charge, and, if the bankrupt require it, shall summon a jury for such purpose, and may direct the creditors' assignee, or the official assignee, or any of the creditors of the bankrupt, to act as prosecutor on such trial: Provided always, that in every case of accusation against a bankrupt of acts amounting to a misdemeanor, it shall be competent to the Court to direct that the bankrupt be indicted and prosecuted in one of the ordinary Courts of criminal justice; and in all other cases the order of discharge shall take effect immediately from its date, subject to the appeal herein provided:

"2. If on such trial by a jury or by the commissioner alone the bankrupt shall be convicted of any offence by this Act made a misdemeanor, the commissioner shall, in addition to the punishment awarded for the offence, have power to direct that the order of discharge be either wholly refused or suspended during such time and upon such conditions as he shall think fit:

"3. If the bankrupt shall not be accused of acts amounting to misdemeanor, or if he shall have been accused and acquitted, but in either case there shall be made, or shall appear to the Court to exist, objection to the granting of an immediate discharge, the Court shall proceed to consider the conduct of the bankrupt before and after adjudication, and the manner and circumstances in and under which his debts have been contracted; and if the Court shall be of opinion that the bankrupt has carried on trade by means of fictitious capital, or that he could not have had at the time when any of his debts were contracted any reasonable or probable ground of expec-

Act, 1861, was not retrospective, and that a bankrupt's order of discharge could not under that section be suspended on the ground that he had contracted a debt without reasonable or probable ground of expectation of being able to pay it, when the debt was contracted before the passing of the Act. The proviso at the end of that section applies only to misdemeanors; it did not apply to sub-s. 3; and Lord Westbury's decision does not appear to have been founded on the proviso. The principle of the decision applies to the present case. The refusal or suspension of an order of discharge, or the granting of it subject to a condition, is in its nature penal.

[Brett, M.R. In *Ex parte Staner* (1) Knight Bruce and Lord Cranworth, L.JJ., held that misconduct by a bankrupt as a trader before the Bankruptcy Act of 1849 came into operation might be properly regarded on an application by him for a certificate under that Act, and the same view was taken by Knight Bruce, V.C., in *Ex parte Dornford.* (2) In s. 159 there was the alternative punishment of imprisonment, and there was the proviso at the end of the section which is not to be found in s. 28

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tation of being able to pay the same, or that, if a trader, he has, with intent to conceal the true state of his affairs, wilfully omitted to keep proper books of account, or, whether trader or not, that his insolvency is attributable to rash and hazardous speculation, or unjustifiable extravagance in living, or that he has put any of his creditors to unnecessary expense by frivolous or vexatious defence to any action or suit to recover any debt or money due from him, the Court may either refuse an order of discharge, or may suspend the same from taking effect for such time as the Court may think fit, or may grant an order of discharge subject to any condition or conditions touching any salary, pay, emoluments, profits, wages, earnings, or income, which may afterwards become due to the bankrupt, and touching after-acquired property of the bankrupt, or may sentence the bankrupt to be imprisoned for any period of time not exceeding one year from the date of such sentence:

"Provided always, that no person shall be liable by virtue of this Act to any criminal proceeding or penalty in respect of any matter which may have occurred before the passing of this Act to which he would not have been liable if this Act had not passed."

(1) 2 D. M. & G. 263.

(2) 4 De G. & Sm. 29.

of the present Act. Suppose a bankrupt had committed a fraud three months before the commencement of the Act, and he was adjudicated a bankrupt the day after the commencement, is it conceivable that the fraud should not be taken into consideration upon the question of granting him a discharge ?]

In *Ex parte Staner* (1) the question was as to the bankrupt's conduct as a trader, and Lord Westbury's decision is directly in point, and is a more recent one. No doubt, in *Ex parte Rogers* (2) a Divisional Court held that s. 28 is retrospective. But there the question was, whether the Court should under s. 18 approve of a composition, and at any rate the decision is not binding on this Court.

(2.) Under the circumstances disclosed by the evidence there was nothing rash or hazardous in the building speculation into which the bankrupt entered : *Ex parte Downman.* (3) After the valuation which was obtained of the property the bankrupt was justified in entering into the speculation.

(3.) The condition imposed by the registrar is excessively harsh and out of all proportion to the offence. The bankrupt would be better off without an order of discharge, for then his future earnings could not be impounded. He ought at least to be allowed £500 a year for the support of himself and his family.

J. Macdonell, for the official receiver; and *Herbert Reed*, for opposing creditors, were not heard.

Brett, M.R. The first question, which arises on the construction of the Act, is, assuming that the bankrupt has been guilty of rash and hazardous speculations, whether those speculations ought to be taken into consideration by the Court under s. 28 of the Bankruptcy Act, 1883, inasmuch as they took place before the passing of the Act. It is said, that if those speculations are taken into consideration, the result will be to make s. 28 retrospective. In my opinion this will not make s. 28 retrospective at all. Sect. 28 is dealing with something which is to happen after it has come into operation, viz., the question whether the bankrupt is

(1) 2 D. M. & G. 263.
(2) 13 Q. B. D. 438.
(3) 32 L. J. (Bkcy.) 49.

to have an absolute discharge or not. Certain rules are laid down for the conduct of the Court in doing that which it has to do after the commencement of the Act. The registrar was acting under s. 28; the adjudication was made after the commencement of the Act. Under s. 28 the bankrupt has to apply to the Court for an order of discharge; it is his doing. Then, on the hearing of the application, i.e., after the commencement of the Act, the Court is to take into consideration a report of the official receiver as to the bankrupt's conduct and affairs. There is a positive enactment that it is to be taken into consideration. Then the section provides that "the Court shall refuse the discharge" (that is in the future) "in all cases when the bankrupt has committed any misdemeanor under this Act, or Part 2 of the Debtors Act, 1869." Some things are there mentioned which must have taken place before the commencement of the Act of 1883. Then it says that the Court "shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge, subject to such conditions as aforesaid." The "facts hereinafter refered to" are mentioned in sub-s. 3. One of them is the omission of the bankrupt to keep proper books of account in his business. It is said that this is a new offence created by the Act. Is the keeping of proper books a right or a wrong thing for a trader? Is the obligation to keep proper books a thing which would startle any trader? Everyone knows that it is a blemish on the character of a trader not to keep proper books, and that it has been so considered for the last 200 years. The same observations apply to the continuing to trade after a trader knows himself to be insolvent, and to the contracting of debts without having any reasonable or probable ground of expectation of being able to pay them. All these things were well known to be improper before the passing of the Act of 1883. Entering into rash and hazardous speculations was wrong conduct before the passing of this Act. The Act is not manufacturing a new wrong thing; it is only taking notice in a new way of that which has always been known to be wrong. In order to limit the section to conduct which has taken place since the passing of the Act, there ought to be in it the words "since the passing of the Act," and there are no such words. If the matter stood upon the statute alone, I should say that there was no reason why the Court should not take into consideration the facts referred to in sub-s. 3, even if they happened before the passing of the Act, when the bankrupt is applying for a discharge after the commencement of the Act. I am inclined to think that those things might be taken into consideration, even if the adjudication had been made before the passing of the Act. But it is said that *In re White* (1) is an authority to the contrary. There, however, the question arose upon s. 159 of the Bankruptcy Act, 1861, which was a peculiar section. By it certain acts were treated as crimes, and the Court was empowered to sentence a bankrupt who had committed them to imprisonment. It was not imprisonment merely for the purpose of enforcing a remedy, but imprisonment by way of punishment, and then there was a proviso at the end of the section that no person should be liable by virtue of the Act to any criminal proceeding or penalty in respect of any matter which might have occurred before the passing of the Act, i.e., liable to the imprisonment to which he might have been sentenced under s. 159. It appears from the reports of the case that Lord Westbury rested his decision on the fact that s. 159 gave a criminal character to the acts in question. The reports have unfortunately omitted to state that counsel called the attention of the Court to the proviso, but they must have done so. There is no such proviso in s. 28 of the present Act, and the things referred to in sub-s. 3 are not treated as criminal acts. They are not in their nature criminal, though they are very wrong things for a trader to do. But there are some other cases contrary to the decision of Lord Westbury. In one of them, *Ex parte Dornford* (2), Knight Bruce, V.C., held that the conduct of a bankrupt as a trader before the Bankruptcy Act of 1849 came into operation, might be taken into account with reference to the provisions of that Act as to the allowance of his certificate. And in *Ex parte Staner* (3), Knight Bruce and Lord Cranworth, L.JJ., came to the same conclusion. Knight Bruce, L.J., said (4): "It has been suggested by Mr. Cooke that, even if the case set up by the opposing creditors were made out, it does not fall within s. 256 of the Bankruptcy Act of 1849, because the particular facts occurred before that statute. For this no decision was cited; and, considering the learning and experience of Mr. Cooke, I think I may take it that none exists; and I state my opinion to be that, if this case comes otherwise within the Act of Parliament, it is not the less so because the conduct complained of took place before the passing of the statute." Every word of that is applicable to the present case. The judgment of Lord Westbury in *In re White* (1) is not inconsistent with it, for it related to a section which was not like s. 28. That section resembles s. 256 of the Act of 1849. We do not attempt to overrule Lord Westbury's decision, but we act on our own construction of s. 28 and upon the decision of the Court of Appeal in *Ex parte Staner*. (2)

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(1) 9 L. T. (N.S.) 702.

(2) 4 De G. & Sm. 29.

(3) 2 D. M. & G. 263.

(4) 2 D. M. & G. p. 267.

Can it then be said that the registrar was wrong in holding that this bankrupt had brought on his bankruptcy by rash and hazardous speculations? This is a question of fact. The bankrupt is a solicitor, and, if he acted properly, he owed his whole time to his business. His business was a small one. Had he any other means? It is obvious that he had no capital at all; the moment he met with a loss he had to borrow money to meet it. He went out of his proper business, and speculated on the Stock Exchange, and lost money to the extent of 1500*l.* He could pay the loss only by borrowing the money. He had not been investing money; he had been playing for a rise or a fall in the value of stocks, when he had not a shilling with which to pay the loss, if there should be a loss. This alone appears to me to be absolutely reckless, rash, and hazardous speculation; it was a thing which no prudent and steady man in the business of a solicitor would have done. Then he went into a speculation in buying building land in the city. There, again, he was playing for a rise in the value of the land, speculating on finding a purchaser at an advanced price. In order to pay for the land, this man, who was without a shilling of his own, borrowed 29,000*l.* on a mortgage of the land. How was he to pay the interest on the mortgage? If he did not find an immediate purchaser for the land he must borrow again to enable him to pay the interest. The property remained on his hands, and the interest accumulated. Then he went into a further speculation in building on the land in order to enhance its value, so that, if he could not sell it, he might let it. If he had had 75,000*l.* in his pocket I should not have thought that this was a rash and hazardous speculation; he would have had a right to lose his own money. But, when a man who has not a shilling of his own, and who has a business of his own to carry on, which commands his whole time and attention, enters into such a speculation, knowing that, if he does not sell or let the land immediately, he must be choked by the interest on the mortgage, to ask us to believe that this is not rash and hazardous speculation is to ask us to become children. There is not a man engaged in business who would not say that this was not only rash and hazardous, but the most reckless rashness. The result is that he is ruined, and his unsecured creditors will not get a shilling. To my mind it is bad practice for any solicitor to enter into speculations not connected with his business. If a solicitor chooses to enter into building speculations, or Stock Exchange speculations, or to lend money to those who are engaged in such speculations, he is doing that which is inconsistent with his duty as a solicitor to his clients, and I wish it was the law that every solicitor who acts in this way should be struck off the rolls. I do not say that this bankrupt has done anything morally wrong, but I think he has been guilty of most rash and hazardous speculation, and that this has brought about his bankruptcy.

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(1) 9 L. T. (N.S.) 702; 33 L. J. (Bkcy.) 22.

(2) 2 D. M. & G. 263.

It is said that the sentence passed by the registrar was too severe. I am disposed to think that it was too lenient, and that the order of discharge should have been absolutely refused. But we cannot alter the registrar's decision, from which there is no appeal on this ground, unless it is palpably wrong.

Baggallay, L.J. The first ground of objection to the registrar's order is that, if there had been rash and hazardous speculations on the part of bankrupt, they occurred before the passing of the Act of 1883, and it is said that s. 28 is not retrospective in its operation. The registrar's order was made under that section. The application for an order of discharge is made to the Court by the bankrupt himself. If the bankrupt has committed a misdemeanor under the Act, or under Part II. of the

Debtors Act, the Court has no discretion, but it must refuse the discharge. With regard to the facts mentioned in sub-s. 3 the Court has no discretion whether it will inflict punishment on the bankrupt, though it has a discretion as to the form of the punishment. Every one of the facts mentioned in sub-s. 3 (with the exception perhaps of (*h*), which may include fraud outside the trading) has reference to "conduct of the bankrupt as a trader." This expression was well known under the Bankruptcy Acts of 1849 and 1861. All the acts of a bankrupt referred to in sub-s. 3 fall short of misdemeanor, though they amount to failure of duty by the bankrupt as a trader. If all acts of the bankrupt before the commencement of the statute are to be excluded from consideration, then, as to sub-s. 3 (*a*), which mentions the omission of the bankrupt to keep proper books of account, sufficiently disclosing "his business transactions and financial position within the three years immediately preceding his bankruptcy," s. 28 is made a dead letter until three years after the commencement of the Act. Other clauses of sub-s. 3 would equally fail of meaning. I think, therefore, that rash and hazardous speculations which took place before the commencement of the Act must be taken into consideration under s. 28. It is said that *In re White* (1) is an authority to the contrary. But there are two cases, *Ex parte Dornford* (2) and *Ex parte Staner* (3), in which it was held that conduct of a bankrupt before the passing of the Act of 1849 might be taken into consideration upon an application for a certificate under s. 256 of that Act. *In re White* (1) was a decision upon s. 159 of the Bankruptcy Act of 1861, the provisions of which were somewhat different from those of s. 28 of the present Act. No doubt at first sight it might appear that the decision is at variance with those in the other two cases which I have mentioned. The reports of *In re White* (1) appear to me very insufficient. But the circumstances were very different from those of the present case. All the provisions of s. 159 of the Act of 1861 were covered by the proviso at the end of it. Lord Westbury arrived at the conclusion that, if the acts which were in question before him had been committed after the passing of the Act, there would have been no ground for the appeal. But he pointed out that the proceeding before him was in the nature of a criminal proceeding, and he held that, being of that character, the penalty ought not to be enforced in respect of acts committed before the Act came into operation, and which were only made a misdemeanor by the Act. I think this is quite sufficient to support Lord Westbury's decision, and, if he was right in his view, the proviso at the end of s. 159 applied, and this explains his decision and shews that it was not inconsistent with the previous decisions on the Bankruptcy Act of 1849. It appears to me, therefore, both on the construction of s. 28 and on the authorities, that conduct of the bankrupt before the commencement of the Act ought to be taken into consideration for the purpose of determining whether his discharge should be granted after the Act has come into operation. Upon the other points I entirely concur with the Master of the Rolls. There can be no doubt that the bankruptcy has been brought about by rash and hazardous speculations, and I agree that the punishment which has been inflicted is not excessive.

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(1) 9 L. T. (N.S.) 702; 33 L. J. (Bkcy.) 22.

(2) 4 De G. & Sm. 29.

(3) 2 D. M. & G. 263.

LINDLEY, L.J. The first point is one of importance to other bankrupts as well as to the appellant. It is said that, if we hold that conduct of the bankrupt before the passing of the Act can be taken into consideration, we shall be giving to s. 28 a retrospective operation. I do not think we shall. All the provisions of the section are prospective, except that the Court is to take into consideration what the conduct of the bankrupt has been. That the construction which we are giving to the section is the right one is to my mind clear to demonstration. Otherwise the result would be this, that the Court could never refuse to grant an order of discharge to a bankrupt against whom an adjudication had been made shortly after the commencement of the Act. The decision in *In re White* (1) was upon a section which was differently worded from s. 28 of the Act of 1883. Under s. 159 of the Act of 1861, the Court had an alternative power of sentencing the bankrupt to a year's imprisonment, and there was the proviso at the end. Lord Westbury had to deal with this section, and, in my opinion, the construction which he gave to it is not open to any criticism. Under s. 28 no penal consequence results to the bankrupt; no

(1) 9 L. T. (N.S.) 702; 33 L. T. (Bkcy.) 22.

misdemeanor is created by the section. The reason upon which Lord Westbury acted is not applicable to the varied language of this section. The two other cases which have been referred to were to the contrary.

As to whether the bankrupt has brought on his bankruptcy by rash and hazardous speculations, I am astonished that there should be any question. That a man who is without a farthing of his own should enter into such speculations at the risk of other people appears to me rash in the extreme. I can see the force of the argument that he borrowed money on the security of the land upon the advice of a competent person as to its value. But he never thought of the alternative—who was to pay his unfortunate creditors in case he should fail to do so himself. It appears to me that the speculations were rash and hazardous, and that his conduct has been utterly reckless. As to the amount of the punishment which shall be inflicted, we cannot interfere with the exercise of the registrar's decision.

H. Reed. The opposing creditors were served with notice of the appeal, and ought to have their costs out of the deposit.

J. Macdonell, for the official receiver. The official receiver as trustee would have opposed the appeal.

Brett, M.R. I think the official receiver ought to have his costs out of the deposit. The opposing creditors who have indulged in the luxury of appearing in this Court as well as in the Court below are entitled to do so, but they must do it at their own expense. I wish to discourage the appearance of an unnecessary number of counsel in these cases.

Solicitors for Appellant: *Linklater, Hackwood, & Co.*
Solicitor for official receiver: *W. W. Aldridge.*
Solicitor for opposing creditors: *F. Lawrence.*

W. L. C.

1885
March 5.

In re WALLIS. Ex parte SULLY.

Bankruptcy—Residential Estate—Home Farm—Farming and Market Gardening for Pleasure—Live and Dead Stock—Bill of Sale—Order and Disposition —" Trade or Business"—Bankruptcy Act, 1883, *s.* 44.

A person who occupies a residential property and engages in farming and market gardening for his pleasure, and carries on the same at a profit, is not carrying on a "trade or business" within the meaning of s. 44 of the Bankruptcy Act, 1883, even although he sells his surplus produce after supplying his household.

But if the primary intention is abandoned, and the business is carried on with a view to profit as a means of livelihood, he will come within the mischief of the section.

In January, 1880, C. W. Wallis, who was a barrister and also a contractor and company promoter, took on lease a property called "Ankerwyke," near Wraysbury, Bucks, at a rental of 400*l.* per annum. The property comprised a country mansion, standing in its own pleasure grounds of about eight acres, with stables, conservatories, and greenhouses, and about seventy-nine acres of pasture and arable land. At Michaelmas, 1880, he took on a yearly tenancy at 250*l.* per annum about 150 acres of arable and pasture land adjoining Anckerwyke, but sublet a portion; so that the total net rental payable by himself was about 600*l.* per annum. He farmed the lands, and bred cattle, and carried on market gardening, for his pleasure; and, after supplying his household with all necessaries, he sold all the crops derived from the farm lands and the surplus produce of the greenhouses, hothouses, and the flowers, at a considerable profit, and out of the proceeds paid all the rents, rates, taxes, and other outgoings; and at the end of each year had a small surplus in hand.

In 1883 he got into difficulties connected with his commercial pursuits, and on the 10th of November, 1883, he executed a bill of sale of all the live and dead stock on the farm and all the furniture in the house to Messrs. Robinson & Fisher to secure the repayment of the sum of 1000*l.* with interest.

On the 21st of December, 1883, Messrs. Robinson & Fisher sold all the chattels and effects comprised in their bill of sale to Mrs. Wallis, who paid for them out of her own moneys.

On the 21st of January, 1884, Mrs. Wallis executed a bill of sale of the same chattels and effects to P. C. Sayers to secure the repayment of 1300*l.* with interest. This bill of sale was duly registered; but the furniture remained in the house in the occupation of Mr. and Mrs. Wallis, and the live and dead stock remained on the farm, and Mr. Wallis continued to use them and to carry on his farming and market gardening as before.

On the 22nd of May, 1884, a bankruptcy petition was presented against Mr. Wallis, and on the 31st of July he was adjudicated bankrupt; and on the 20th of August J. W. Sully was appointed the trustee.

On the 23rd of July, P. C. Sayers, who had no notice of the act of bankruptcy, or of the bankruptcy petition, took possession under his bill of sale; but J. W. Sully, as the trustee in bankruptcy, claimed all the live and dead stock and implements of husbandry on the farm, on the ground that they were, at the commencement of the bankruptcy, in the use and occupation, order and disposition, of the bankrupt for the purpose of his "trade or business," with the consent of the true owner, within the meaning of s. 44 of the Bankruptcy Act, 1883.

Winslow, Q.C., and *H. Reed*, for the trustee. In the late Bankruptcy Act the order and disposition clause applied to all goods in the possession of a bankrupt, being a trader, at the commencement of his bankruptcy, but the Act of 1883 (s. 44), has altered the law. It extends the operation of the clause to a "business," but restricts it to goods in the possession of the bankrupt "in his trade or business." Under the old law, the term "trader" was a term of art, and was well defined, and did not include a farmer, but there is no definition of a "trade or business" in the new Act. It is apprehended, however, that they would be held to apply to any occupation engaged in with a view to profit as the means of obtaining a livelihood: *Doe* v. *Keeling* (1); *Rolls* v. *Miller* (2); *Ex parte Newall.* (3) Therefore live and dead stock-in-trade and implements of husbandry used by a farmer engaged in farming would be goods used in a business. Next, there has been no apparent change of ownership at any time. The implements of husbandry were marked "C. A. W.," and from first to last all the goods remained in the possession of the bankrupt as the ostensible owner, and he used them in carrying on his businesses of a farmer and market gardener on land of which he was the sole tenant; and although it may be that at first he carried on business for the purpose of his pleasure, yet undoubtedly he ultimately carried them on as a means of livelihood.

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(1) 1 M. & S. 95.
(2) 27 Ch. D. 71.
(3) 3 Deac. 333.

[Cave, J. Does a man who sells his surplus fruit and flowers become a market gardener?]

No: but if he raises fruit and flowers with the object of selling the bulk of them at a profit, that is carrying on a business. Lastly, having regard to all the circumstances, Sayers must have known, or ought to have known, that these goods were in the possession of Wallis for the purposes of trade, and therefore his consent will be inferred.

Ribton (*Warmington, Q.C.*, with him). On the facts the reputed ownership clause does not apply, because the goods became the property of the wife, and were either in the joint possession of the husband and wife, or in the possession of the husband as trustee for his wife. Next, Wallis was not carrying on a business within the meaning of the section. He was not a trader, and at most the business he was engaged in was that of farming for his pleasure, and the fact that he carried it on profitably is not sufficient to bring him within the section: *Patten* v. *Browne*. (1)

Winslow, Q.C., in reply on the question of joint possession, referred to *Jarman* v. *Woolloton*. (2)

Cave, J. In this case the trustee claims certain goods as being in the possession of the bankrupt in his trade or business with the consent and permission of the true owner.

The first question is whether the bankrupt carried on a trade or business. The trades or businesses which it is suggested he carried on were those of a farmer and market gardener. It is important to see what was the nature of his tenancy and the circumstances under which he became tenant. Mr. Wallis appears to be a gentleman of a somewhat speculative turn of mind, devoting his energies to a great many different callings. He is said to be a barrister and a contractor, as well as a farmer and market gardener. In January, 1880, he took Anckerwyke House and seventy-nine acres of land at a rent of 400*l.* a year; and it is obvious from the description of the house and of the land that has been given in evidence, that it is an ordinary country-house having a certain quantity of land attached to it, and not the kind of place which a farmer or market gardener would have taken for the purpose of his business. No one has ventured to suggest that any market gardener has ever taken this place as a market garden; or that any farmer would dream of taking a house of this character, with seventy-nine acres of land, at a rental of 400*l.* a year, with a view of getting his living by farming.

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(1) 7 Taunt. 408.

(2) 3 T. R. 618.

Mr. Wallis appears to have had a fancy for breeding horses, cattle, and pigs; and in order to pursue that avocation he thought it desirable, apparently, to have a further quantity of land, and at Michaelmas, 1880, he took another 150 acres of land at a rent of 250*l.* per annum. It is suggested that, whatever may be the case in reference to the seventy-nine acres, the taking of this further quantity of 150 acres shews that he was intending to carry on the business of a farmer; but, if that was the intention with which he took this land, it certainly is remarkable that, having a comparatively small quantity of land, he should at once have proceeded to sublet about forty acres of it and have retained only 189 acres in his hands at a rental with the house of 600*l.* a year. Therefore the circumstances under which the house and land were taken are about as far as possible removed from the notion of any intention of carrying on any trade or business at a profit.

What is done subsequently to that? It may be, of course, that a man who takes a large country mansion with a quantity of land attached to it for the purpose of pleasure, and who proceeds to take still more land also for the purpose of pleasure, may nevertheless change his mind and turn his attention to business pursuits, although one would not expect anything of the kind to be done. Therefore we have to see what did take place. What was on the farm in the way of live stock were some horses, some of which appear to have been used for working the farm, and some apparently for the purpose of breeding, or both combined. There were also some cows, and these appear to have been there for the purposes of the house. A house of that kind naturally requires a considerable quantity of dairy produce; and during the whole time the dairy produce was used chiefly in the house, and the surplus only was sold.

Now, it has been contended on behalf of the respondent that a man who has a quantity of cows and horses and a large garden, and who simply sells the surplus produce, is not carrying on the business of a market gardener, and is not carrying on the business of a farmer; and that has been so strongly felt by those who advised the trustee that they have abandoned the claim to the cows.

Well, then, what else is there? It is necessary if cows are kept, that a certain amount of land should also be kept for their accommodation. I do not suppose that there are many people who keep cows and buy the whole of the stuff on which the cows are to be fed. So, again, if horses are kept for the purposes of breeding—and we are told that foals were bred and sold—a quantity of land must be retained for the purpose of feeding them.

I am therefore unable to say that there ever was a time when the primary intention of holding this house and land for the purposes of pleasure was changed into an intention of holding it for the purposes of business. Mr. Wallis appears to have got into difficulties, which is not at all unlikely when a man has too many things on his hands. Having got into difficulties, what was regarded as the surplus was disposed of in the market in order to produce some ready money, and the purpose of getting money began little by little to get the upper hand; but I do not think that there was any time at which I can say distinctly that the primary intention—the intention with which he set out of taking this house and land for the purpose of pleasure and enjoyment—was distinctly changed into the purpose of holding it for business only, so that these goods were in the possession of the bankrupt in his trade or business.

Now, if I come to look at the articles which are claimed, I find that there are a few horses and ponies. Ponies are not usually bought by a farmer for the purpose of his business; so that that

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certainly does not look very much like carrying on a business. It looks more like the notion of enjoyment. Then there are one or two pigs. Now that again does not look like keeping pigs for the purpose of profit. I suppose that there are very few houses of this character in which such animals are not kept, and whether a man should buy his pigs, or whether he should breed them, depends very much upon his own fancy in the matter.

Then come a quantity of outdoor effects, and it is very difficult to distinguish between what were used purely for the purposes of pleasure and what were used for the purposes of the farm; but I conceive that the whole of them were used for the purposes of pleasure in the first instance; and, as I have said, I do not find any period when I can distinctly hold that that purpose of pleasure was changed into a purpose of business.

Then I come to the market gardening, in regard to which there has been most stress, on the ground that all the flowers were for sale, and that no flowers were allowed to Mrs. Wallis, and that she had to buy them back from the person to whom they were sold. But when I look at the list of the green-house and hot-house plants, and of the stove plants, and so on, I find nothing at all except what one would ordinarily expect to find in a house like this. There is apparently about that amount of conservatory and glass which one would suppose that a person, who could afford to pay 400*l.* for a house and seventy-nine acres of land, would expect to have for the purposes of pleasure; and the fact that under temporary pecuniary difficulties Mr. Wallis determined to sell the flowers, instead of allowing Mrs. Wallis to put them in her drawing-room, cannot, in my opinion, amount to the carrying on of a business; and therefore I think that the whole foundation of the claim fails.

It is not necessary to go any further, as I find that the bankrupt was not carrying on any trade or business upon these premises, and consequently the application must be refused with costs.

Order accordingly.

Solicitor for trustee: *S. H. Behrend.*
Solicitor for Sayers: *E. Lee.*

H. L. F.

1885
Jan. 19.

In re MAUGHAN. Ex parte MONKHOUSE.

Bankruptcy—Agreement for a Lease—" Land burdened with onerous covenants" —" Property"—Disclaimer—Bankruptcy Act, 1883, *ss.* 44, 55, 168.

The right of disclaimer conferred on trustees by s. 55 of the Bankruptcy Act, 1883, is not limited to property of the bankrupt divisible amongst his creditors as defined by s. 44, but extends to any property as defined by s. 168 from which no benefit can accrue to the bankrupt's estate.

A debtor held his business premises for a term of years under an agreement for a lease, and entered into a binding contract for the sale and assignment of his business and his business premises to a company, but became bankrupt before the completion of the contract:—

Held, that the debtor's interest in the agreement for a lease was in the nature of land burdened with onerous covenants which his trustee in bankruptcy could under the circumstances disclaim.

By an agreement in writing not under seal dated the 6th of May, 1879, and made between the Investment Company, Limited, of the one part, and B. W. Maughan, of the other part, the company agreed to grant and B. W. Maughan agreed to accept an underlease of part of the ground-floor of No. 41, Cheapside, in the city of London, for twenty-one years from the 24th of June, 1879, at the yearly rent of 1000*l.* per annum for the first year and thereafter at the increased yearly rent therein mentioned. The agreement was to be carried into effect by a formal deed which was to contain the covenants and provisions mentioned in the agreement. B. W. Maughan was let into possession under this agreement, but a more formal instrument was not executed.

By another agreement not under seal dated the 13th of June, 1884, and made between B. W. Maughan (the vendor) of the one part, and Maughan's Patent Geyser Company, Limited (the purchaser), of the other part, the vendor agreed to sell to the purchaser for 6000*l.* his business of a gas engineer and certain patent rights, and the leasehold premises, No. 41, Cheapside, where the business was being carried on. The purchase was to be completed on the 30th of June, 1884, and on or after that day the vendor was, upon the request and at the cost of the purchaser, to execute and do all such assurances and things as should reasonably be required for vesting in the purchaser the property agreed to be sold and giving it the full benefit of the contract.

On the 29th of August a receiving order was made against B. W. Maughan, but his creditors subsequently accepted a scheme of arrangement which was confirmed by the Court. This scheme provided, amongst other things, that the property of the debtor divisible among his creditors under the receiving order should vest in a trustee to be appointed under the scheme, and that such trustee should administer the aforesaid property as nearly as might be in the like manner as under an order of adjudication.

This was an application by G. B. Monkhouse, the trustee appointed under the scheme, for leave to disclaim the interest of B. W. Maughan under the agreement of the 6th of May, 1879, in the premises No. 41, Cheapside.

The trustee, or Maughan's Patent Geyser Company, Limited, had retained possession of the premises until the 19th of December, 1884, when the Investment Company put in a distress for rent which realised about 190*l.*, leaving a balance of about 900*l.* still due to them.

Mr. Holmes (solicitor), for the trustee. The word "property" in the 55th section of the Act is defined by s. 168 to include real and personal estate and obligations in the widest sense. This is property burdened with onerous covenants which the trustee ought to be at liberty to disclaim without any terms being imposed upon him.

E. C. Willis, Q.C., for the Investment Company. This is not property which can be disclaimed. Whatever interest Maughan has under the agreement of May, 1879, he holds in trust for the company to which he has sold it. He is under a binding obligation to them to assign his whole interest to them. This is trust property, therefore, and there is a uniform consensus of authority under the earlier Acts that trust property does not pass to the trustee in bankruptcy; and s. 44, sub-s. 1, contains a similar enactment. But assuming there is some property in the debtor or his trustee, still it is property which the trustee cannot possibly disclaim, because the 55th section only deals with property divisible amongst the creditors. That section gives a right of disclaimer

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with respect to any "property of the bankrupt," and by s. 44 the words "property of the bankrupt" are defined to mean "the property of the bankrupt divisible among his creditors." Therefore, however wide a definition may be given to the word "property" by s. 168, still it must, for the purposes of s. 55, be property which is divisible amongst the creditors, but which by reason of the burthens attached to it the trustee desires to disclaim. This is not property divisible among the creditors, but an interest which the debtor holds upon trust for the purchasing company; and, further, this is not a bankruptcy, but a scheme of arrangement under the very words of which the only property vested in the trustee is the property divisible amongst the creditors, which this is not. Lastly, if there is a disclaimer, it should be upon the terms of the trustee paying rent up to the disclaimer, because he or the purchasing company have been in the beneficial occupation of the premises down to the present time.

S. Woolf, for the purchasing company. The company do not oppose a disclaimer, and are quite willing to give up possession.

[He also cited *Ex parte Sir W. Hart-Dyke* (1); *Walsh* v. *Lonsdale.* (2)]

FIELD, J. I am of opinion that I ought to grant this application, and that I have power to grant it. On the true construction of the statute this is property which the trustee has a right to ask the Court for leave to disclaim. Since the Judicature Acts there is now no distinction, that I can see, between a lease and an agreement for a lease, because equity looks upon that as done which ought to be done. Consequently, after the execution of the agreement for a lease, this debtor had a property vested in him, that is to say, he had land which was burthened with onerous covenants. That being so, and if the case stood there, the trustee would clearly be entitled to disclaim. But since the date of the agreement the debtor has entered into a binding contract to assign all his interest to a company, and no doubt the terms of the contract are wide enough to pass all his beneficial interest in the property. He has not, however, executed any assignment, but he is under an obligation to execute or to obtain the execution of an

(1) 22 Ch. D. 410.

(2) 21 Ch. D. 9.

assignment to the purchasing company. Therefore, this was property or land burthened with onerous covenants which at the date of the receiving order was vested in the debtor. Under the old law in bankruptcy trust estates vested in a bankrupt did not pass to his trustee in bankruptcy, and if the language of this new Act was the same as the previous Acts there might be something in the argument which Mr. Willis has addressed to me; but it seems to me that in the Act of 1883 the legislature has clearly evinced an intention of enlarging the power of disclaimer, and the question is, whether this is property, which, under s. 55, the trustee has power to disclaim. I clearly think it is. On looking at the Act one sees that it purposely speaks of two kinds of property—property divisible amongst the creditors, and property which the trustee may disclaim—and in the use of the word "property" in s. 55 one has to consider which kind of property the legislature is there dealing with. Now, s. 55 says "any part of the property of the bankrupt" which is onerous may be disclaimed. Mr. Willis says this is not property which can be disclaimed. Why not? Because, says he, s. 44 defines "property of the bankrupt" to mean property divisible amongst his creditors. But then am I bound to read the word "property" in s. 55 with the limitation given in s. 44? I think not. I think those words "divisible amongst his creditors" are purposely omitted from s. 55. The governing words in that section for the purposes of this case are "land of any tenure burdened with onerous covenants." What does that expression mean? It means property from which no benefit can accrue to the bankrupt's estate. I am of opinion, therefore, that it was not the intention of the legislature to cut down the general words of the section and that it applies to any property as defined by s. 168, although not divisible amongst the creditors, which is of an onerous nature.

But then it is said that this is not land. I think it is for the reasons I have already given. It is quite true the debtor has bound himself to assign his interest, but still there is some property or obligation left in him. I am of opinion, therefore, that both of the objections raised by the landlord fail, and that the trustee is entitled to disclaim. That being so, the next question is, on what terms is he to be allowed to disclaim. I think that as both he and the purchasing company are willing to give up possession, there should be no order as to payment of rent. The costs of this application will come out of the estate.

Solicitors: *Ingle, Cooper, & Holmes; Hughes, Hooker, & Co.; Loxley & Morley.*

H. L. F.

March 9.

IN RE SANDWELL. EX PARTE ZERFASS.

Bankruptcy—Disclaimer of Lease—Landlord's Claim for Compensation—Jurisdiction—Bankruptcy Act, 1883, *ss.* 51, 121—*Bankruptcy Rules*, 1883, *r.* 232.

Where an order is made under s. 121 of the Bankruptcy Act, 1883, for the summary administration of a bankrupt's estate, and the trustee, in pursuance of the power conferred on him by rule 232 of the Bankruptcy Rules, 1883, disclaims, without any application to the Court, the leasehold premises of the bankrupt, the Court has no jurisdiction to give any compensation to the landlord out of the bankrupt's estate for the use and occupation by the trustee of the leasehold premises for the purposes of the bankruptcy, even although a benefit has thereby resulted to the estate.

BY deed, dated the 11th of January, 1883, P. Zerfass demised to T. Sandwell, No. 75, Kingsland Road, in the county of Middlesex, for the term of twenty-one years from the 29th of September, 1882, at the yearly rent of 160*l.*, payable quarterly.

On the 1st of August, 1884, T. Sandwell was adjudicated bankrupt, and an order having been made the same day for the summary administration of the estate under s. 121 of the Bankruptcy Act, 1883, the chief official receiver thereupon became the trustee in the bankruptcy.

The trustee at once took steps to sell the bankrupt's goods and effects at 75, Kingsland Road, but, finding a clause in the lease forbidding a sale by public auction on the demised premises, applied to P. Zerfass for and obtained leave to hold a sale on payment of 21*l.*, being arrears of the rent which had accrued prior to the 25th of March, 1884. The trustee also paid the quarter's rent which had accrued on the 24th of June, 1884.

The sale took place on the 29th of August, and on the 8th of September the trustee served P. Zerfass with a notice under rule 232 of the Bankruptcy Rules, 1883, of his intention to disclaim the lease within seven days, and on the 12th of September served Zerfass with notice of an absolute disclaimer of the lease; but in fact the trustee did not give up actual possession of the premises until the 19th of September.

This was an application by P. Zerfass that he might be paid out of the estate of the bankrupt the sum of 36*l.* 18*s.*, being a sum equivalent to the rent which accrued between the 24th of June and the 19th of September, 1884.

F. C. Willis, for the motion. The landlord is entitled to some compensation for the use and occupation of the premises by the trustee, especially when such occupation has resulted in a benefit to the estate: *In re Bushell.* (1) The 232nd rule of the Bankruptcy Rules, 1883, was not intended to confer on the trustee an absolute power to deprive a landlord of the rights which he would otherwise possess.

Muir Mackenzie, for the trustee. In this case the right to disclaim was absolute, and having been exercised the Court cannot give any relief, and the trustee is under no liability to pay anything to the landlord. By the 3rd sub-section of s. 55 of the Act a trustee cannot disclaim a lease without the leave of the Court "except in any cases which may be prescribed by general rules," and then under the 232nd rule a lease may be disclaimed without the leave of the Court when (amongst other cases) the estate is being administered under s. 121 of the Act. This is such a case, and the disclaimer operates under sub-s. 2 of s. 55 to determine, as from the date of the disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and also to discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him. The Court, therefore, has no jurisdiction to put the trustee on any terms, or to order the payment of any rent or other sum of money, out of the estate by way of compensation.

F. C. Willis, in reply.

CAVE, J. The point I have to determine is, whether I have any authority to order the official receiver, who in this case is the

(1) 23 Ch. D. 115.

trustee in the bankruptcy, to pay any sum of money to the landlord by way of compensation for the time during which he remained in possession of the leasehold premises of the bankrupt until the 19th of September, when possession was given to the landlord. Now in order to justify me in making any such order I must find something in the Act which empowers me to entertain the application. But if the Act gives me no such power then I cannot make the order. My powers are strictly limited by the Act and the Rules, and beyond them I have, I think, no power to go. Now the 1st sub-section of s. 55 of the Act empowers the trustee, "subject to the provisions of this section," to disclaim onerous property of the bankrupt notwithstanding that he has endeavoured to sell, or has taken possession of, the property, or exercised any act of ownership in relation thereto; and sub-s. 2 provides that the disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him. Then there follows in the 3rd sub-section a power which I can exercise when the trustee comes to the Court for leave to disclaim. The 3rd sub-section enacts that a trustee shall not be entitled to disclaim a lease without the leave of the Court, except in any cases which may be prescribed by general rules, and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, &c., as the Court thinks just. That sub-section, therefore, expressly provides that I can only impose terms on granting leave to disclaim. Now this particular case comes within rule 232, which expressly empowers the trustee to disclaim without coming to the Court for leave. Therefore my power to impose terms is clearly gone. The legislature has said that a trustee shall not disclaim a lease except by leave of the Court or in cases prescribed by the general rules; and whether this point was considered or not I do not know, but, at all events, so long as rule 232 stands, my power to impose terms does not apply to the cases mentioned in that rule. I am of opinion, therefore, that I have no power to make an order on this application, and consequently that it must be dismissed with costs.

Order accordingly.

Solicitor for landlord: *R. Ward.*
Solicitor for trustee: *W. W. Aldrige.*

H. L. F.

IN RE GILLESPIE. EX PARTE REID & SONS.

March 10.

Bankruptcy—Mutual Dealings—Bill accepted and paid by Creditor after Notice of Debtor's Bankruptcy—Set-off—Bankruptcy Act, 1883, *s.* 38.

Where there are mutual dealings between a debtor and his creditors, the line as to set-off must, as a general rule, and in the absence of special circumstances, be drawn at the date of the commencement of the bankruptcy.

ON the 9th of April, 1884, A. M. Gillespie, W. Gillespie, and C. M. Gillespie, trading as A. M. Gillespie & Co., filed their petition in bankruptcy; and the same day a receiving order was made, and Mr. Young was appointed special manager of the bankrupt's estate, and subsequently he was appointed the trustee.

At the date of the receiving order Messrs. La Mothe & Cassar, a firm in the West Indies, were largely indebted to the bankrupts, and on the 12th of April a letter was received by the bankrupts from Messrs. La Mothe & Cassar, inclosing a remittance on account of their debt, with a request to place the said remittance to their credit. The remittance consisted of a three months' bill for 100*l.*, dated the 27th of March, 1884, and drawn by one D. Adams upon Messrs. Reid & Sons, a firm in London, who, at the date of the receiving order, were creditors of the bankrupts for 111*l.* 14*s.* 6*d.*, on the account current between them.

The same day that the bill was received by the bankrupts, it was presented by Mr. Young to Messrs. Reid & Sons for acceptance, who, after some hesitation, accepted it, but claimed the right to set off the amount payable on the bill against the 111*l.* 14*s.* 6*d.* due to them on their current account with the bankrupts. The bill fell due on the 24th of June, and was paid by Messrs. Reid & Sons under protest, it being arranged that the trustees should not part with the 100*l.* without giving Messrs. Reid & Sons an opportunity of obtaining the decision of the Court on the point raised by them.

Messrs. Reid & Sons applied for an order on the trustee to refund to them the 100*l.*

Pyke, for Reid & Sons. The question turns upon the construction of s. 38 of the Bankruptcy Act, 1883. The section mentions no time at which the account is to be taken. The only limit to the right of set-off is contained in the proviso at the end of the section, and expressly applies to cases where *credit* is given to the debtor. The inference is that the restriction does not apply where a creditor claims the benefit of a *debit*—which is this case. The section is similar to s. 39 of the Bankruptcy Act, 1869, which was considered in *Elliott* v. *Turquand.* (1) It is submitted that there is no hard and fast rule as to set-off, and that the line should be drawn where the justice of the case requires it.

Yate Lee, for the trustee. The right to set-off can only arise where there are mutual dealings, that is, a mutual debit and a mutual credit. But there can be no mutual dealings after the commencement of a bankruptcy, and the rights of parties cannot be altered by any transactions that take place after that date. The principles of *Alloway* v *Steere* (2) and *Ex parte Sir W. Hart-Dyke* (3) apply. The line as to set-off must be drawn at the commencement of the bankruptcy: *Dickson* v. *Evans* (4); *In re Milan Tramways Co.* (5)

Pyke, in reply.

Cave, J. In this case I am of opinion that my judgment must be in favour of the trustee. The question is whether Messrs. Reid & Sons, having accepted a bill after they had notice of the bankruptcy, are entitled to set off the amount of the bill against the sum due to them from the bankrupts on the current account between them. Now that is admitted to depend on the construction of the 38th section of the Bankruptcy Act, which deals with mutual dealings and mutual credits; and the important

(1) 7 App. Cas. 79, 86–87.

(2) 10 Q. B. D. 22.

(3) 22 Ch. D. 410.

(4) 6 T. R. 57.

(5) 25 Ch. D. 587, 591.

point to ascertain is, down to what time these mutual dealings and credits are to be continued. In other words, at what date is the line as to set-off to be drawn. In *In re Milan Tramways Co.* (1), Lord Selborne said: "It is impossible that a person, who at the time of the bankruptcy owes a debt to the bankrupt and has no right of set-off, can acquire such a right by taking an assignment of another debt due to another creditor of the bankrupt;" and it seems to me that the converse case equally applies, viz., that a creditor, who has at the time of the bankruptcy no right to set-off, cannot acquire such a right by any subsequent transaction. Here bankruptcy intervened and put an end to the previous mutual credits and stopped the mutual dealings between the bankrupts and Messrs. Reid & Sons. It is contended that s. 38 nowhere states where the line as to set-off is to be drawn, and that *Elliott* v. *Turquand* (2) shews that that line is not necessarily to be drawn at the time of the bankruptcy. In that case, however, there was a secret act of bankruptcy, and consequently the other party would, not unnaturally, go on dealing until he knew of the bankruptcy. But all the circumstances which applied to justify the decision in that case fall very far short of justifying me in going to the extent to which I am invited to go in this case. In my opinion, it is impossible to get over the statement of the law as laid down by Lord Selborne and Fry, L.J., in *In re Milan Tramways Co.* (3). Lord Selborne says: "Now under s. 39 of the Bankruptcy Act, 1869, the line is drawn at the time of the bankruptcy, and the rights of the parties are not to be altered by subsequent transactions;" and Fry, L.J., says (p. 594): "Is there any right of set-off by reason of the 10th section of the Judicature Act, 1875, having imported into winding-up the 39th section of the Bankruptcy Act, 1869? That section refers to the state of things at the time of the bankruptcy. In *Dickson* v. *Evans* (4) Lord Kenyon says: 'In cases of this sort the question must be considered in the same manner as if it had arisen at the time of the bankruptcy, and cannot be varied by any change of situation of one of the parties.' That has been the uniform rule." Now the only modification that has been introduced into that rule is, that where the act of bankruptcy is secret the line is to be drawn when the act of bankruptcy becomes known to the creditor, and there is no authority to justify me in carrying the law further. Here it is admitted that the bankruptcy was known to Messrs. Reid & Sons at the time they accepted the bill. I am of opinion, therefore, that this case falls within the rule as stated in *In re Milan Tramways Co.* (1), and not within the exception contained in *Elliott* v. *Turquand* (2), and consequently that this application fails, and must be dismissed with costs.

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(1) 25 Ch. D. 587, 591.

(2) 7 App. Cas. 79.

(3) 25 Ch. D. 587.

(4) 6 T. R. 57, 59.

Order accordingly.

Solicitors: *Irvine & Hodges; Druces, Sons, & Attlee.*

H. L. F.

March 23.

IN RE PEARCE. EX PARTE CROSSTHWAITE.

Bankruptcy—Execution Creditors—Writs of Fi. Fa. for more and for less than 20l.—Sale—Notice to Sheriff of Bankruptcy Petition—Title of Trustee—Bankruptcy Act, 1883, *ss.* 45, 46.

Where the sheriff sells under an execution for more than 20*l*., and within fourteen days afterwards receives notice of a bankruptcy petition, the effect of s. 46, sub-s. 2, of the Bankruptcy Act, 1883, is not to render the sale absolutely void, but to deprive the execution creditor of the fruits of the sale, and to transfer them to the trustee in the bankruptcy for the benefit of the general body of the creditors.

Where, therefore, a sheriff is in possession under several writs, some for more and some for less than 20*l*., and proceeds to sell, the writs are payable in order of priority so long as there are funds to pay; but, if he receives notice of a bankruptcy petition within fourteen days after the sale, only those writs are entitled to be paid which are for less than 20*l*., and which would have been paid had not bankruptcy supervened.

On the 10th of April, 1884, R. Crossthwaite recovered judgment for 11*l*. 15*s*. and 18*s*. for costs in the City of London Court against H. Pearce, and on the 22nd of April he lodged his warrant for execution with the sheriff.

At this time four other warrants for execution had been lodged

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(1) 25 Ch. D. 587.

(2) 7 App. Cas. 79.

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with the sheriff by judgment creditors of H. Pearce for the following amounts and in the following order.

			£	s.	d.
11th Feb., 1884,		Perrott & Habershon . .	41	1	6
18th Feb.,	„	Barclay	6	0	0
10th April,	„	Parmley	47	17	11
„	„	Woodall	34	6	6

On the 28th of April the sheriff took possession under all the writs, and on the 12th of May he sold for about 160*l.*

On the 22nd of May a bankruptcy petition was presented against H. Pearce, and a receiving order was made thereon, and notice thereof was the same day served upon the sheriff. Thereupon the sheriff, after deducting his own expenses and costs of sale, and paying Barclay's debt in full, paid over 89*l.* 19*s.*, being the balance of proceeds of sale, to the official receiver, who subsequently became the trustee in the bankruptcy.

This was an application by R. Crossthwaite that the trustee might be ordered to pay him the amount of his judgment and costs out of the assets of the bankrupt.

March 10. *H. Reed,* for the application. The execution having been completed by seizure and sale before notice of the receiving order, Crossthwaite was a secured creditor whose rights could not be ousted except by express statutory enactment: *Ex parte Lovering* (1); *Ex parte Rocke.* (2) Under s. 87 of the Bankruptcy Act, 1869, which is in substance the same as s. 46 (sub-s. 2) of the Act of 1883, the effect of notice to the sheriff within fourteen days after the sale was to make an execution for more than 50*l.* void as against the trustee: *Ex parte Rayner.* (3) Therefore, the same rule now applies as to execution over 20*l.* The result is to let in the executions for under 20*l.*: *Goldschmidt* v. *Hamlet* (4); *Graham* v. *Witherby.* (5)

Macdonell, for the trustee. The Court can only look at the literal words of s. 46, sub-s. 2. Independently of bankruptcy, the sheriff would have paid out the several executions in order of date, in which case nothing would have been left for the present applicant. Then what is the effect of bankruptcy? There is nothing in the section which makes executions for over 20*l.* absolutely void, but it simply directs the sheriff what to do if he receives notice of a receiving order. He is to pay over the proceeds to the trustee in the bankruptcy, and the concluding words of the section clearly give the trustee the right to stand in the shoes, as it were, of the execution creditor and to hold the proceeds against all subsequent execution creditors, whether under 20*l.* or not.

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(1) Law Rep. 17 Eq. 452.

(2) Law Rep. 6 Ch. 795.

(3) Law Rep. 7 Ch. 325.

(4) 6 M. & G. 190.

(5) 7 Q. B. 491.

H. Reed, in reply.

Cur. adv. vult.

March 23. CAVE, J. In this case an application was made by an execution creditor of the bankrupt for an order on the trustee to pay over to the applicant 12*l.* 13*s.*, the amount which the sheriff was directed to levy on the goods of the bankrupt under a fi. fa. issued at the instance of the applicant. In the beginning of May, 1884, the sheriff was in possession of the goods of the bankrupt under several writs, of which the first in order of priority was for 41*l.*, the second for 6*l.*, the third for 47*l.*, the fourth for 34*l.*, and the fifth, that of the applicant, for 12*l.* 13*s.*

On the 12th of May the sheriff sold all the goods which he had seized and realised a balance, after deducting rent and other charges and expenses, of 89*l.* 19*s.* This sum the sheriff continued to hold until the 22nd of May, when he had notice of a bankruptcy petition having been that day presented against the debtor; and subsequently after the adjudication he paid 6*l.* to the execution creditor whose writ was second in point of time, and handed over the balance to the trustee.

Sect. 46, sub-s. 2, of the Bankruptcy Act, 1883, enacts that where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding 20*l.* the sheriff shall deduct the costs of the execution from the proceeds of sale and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon or on any other petition of which the sheriff has notice,

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the sheriff shall pay the balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor. Mr. Reed, for the applicant, contended that the executions held by the sheriff for sums of 20*l.* and upwards were avoided by this section, and consequently that the applicant's execution was let in and that the sheriff ought to have paid him his 12*l.* 13*s.*

Some light will be thrown on the question by considering what is the duty of a sheriff who has several writs to execute. The case of *Aldred* v. *Constable* (1) shews that the duty of the sheriff is to execute first that writ which is first delivered to him, and when he has sold enough to satisfy that writ he should sell under the next in order. Thus, in the present case, the sheriff's duty was to sell under the first writ until he had realised a net sum of 41*l.* He was then to sell under the next writ until he had realised a further sum of 6*l.* to satisfy the second writ, and then to continue the sale under the third writ. The goods did not realise enough to satisfy the third writ, and consequently his duty to sell under the fourth and subsequent writs never arose from want of goods to sell, and as to these writs the proper return for the sheriff to make was one of nulla bona. Having sold all the goods and realised only 89*l.* 19*s.*, the sheriff had in hands 41*l.* realised under the first writ, 6*l.* realised under the second writ, and the balance realised under the third writ, and he had nothing in his hands under the subsequent writs. Now applying the statute to this state of things, when the sheriff got notice of a petition and found it was followed by adjudication, he was bound to pay over to the trustee the sum he held in his hands for the first and third creditors, because their judgments were for over 20*l.*, but as to the 6*l.* he was bound to pay that to the second creditor. The sheriff never sold under the fourth or subsequent writs, and consequently the position of those creditors cannot be better than if the sheriff had seized under their writs and not sold, in which case the first clause of s. 46 would have applied.

Now, undoubtedly, if two writs are delivered to the sheriff successively, and the prior one is for any reason void, the sheriff must disregard it and execute the second: *Christopher* v. *Burton* (2); and if I were satisfied that the effect of s. 46 is to render writs of execution in respect of a judgment for a sum exceeding 20*l.* void, I should have to decide in favour of the applicant; but I cannot see that that is the effect of the section, which only directs the sheriff what he is to do with money he holds for the execution creditor, but nowhere enacts that the execution shall be void, although undoubtedly the effect is that the execution creditor, where his judgment is for a sum exceeding 20*l.*, loses the benefit of it. Mr. Reed, in support of his argument, referred to some cases decided under the Act 6 Geo. 4, c. 16, s. 108, which it is necessary to consider. That section enacted that no creditor having security for his debt, or having made any attachment in London or any other place by virtue of any custom there used of the goods and chattels of the bankrupt, should receive upon any such security or attachment more than a rateable part of such debt in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon, any part of the property of such bankrupt before the bankruptcy; provided that no creditor, though for a valuable consideration, who should sue out execution upon any judgment obtained by default, confession, or nil dicit, should avail himself of such execution to the prejudice of other fair creditors, but should be paid rateably with such creditors. The first case under the Act appears to have been *Taylor* v. *Taylor* (1), in which the Court of King's Bench refused to set aside, at the instance of the assignees, as void, an execution on a judgment by nil dicit where, after seizure and before sale, the execution debtor had become bankrupt. This case was followed by that of *Wymer* v. *Kemble* (2), in which it was held that, where an execution upon a judgment by default had been perfected by seizure and sale before the bankruptcy, the execution creditor was entitled to the proceeds. Then came the case of *Notley* v. *Bink* (3), in which the same Court held that where the sheriff had seized the goods of an execution debtor under two executions upon judgment by nil dicit, and had after the execution debtor had become bankrupt sold the goods and paid the proceeds to the execution creditors, he was liable to refund the amount to the assignees, but the Court refused

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(1) 6 Q. B. 370.

(2) 3 Ex. 160.

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(1) 5 B. & A. 392.

(2) 6 B. & C. 479.

(3) 8 B. & C. 160.

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to decide whether he was a wrong-doer in selling under the writs. The case of *Goldschmidt* v. *Hamlet* (1) is very imperfectly reported, but it appears to decide that where the sheriff had seized under several writs before the bankruptcy, and the first of such writs was upon a judgment on a warrant of attorney, the effect of the statute was not to transfer the right of the first execution creditor to the assignees, but to avoid or supersede that execution, leaving to the other execution creditors the advantage which the Act secured to them as claiming under executions which had been levied by seizure before the Act. In *Cheston* v. *Gibbs* (2) it was held that a sheriff, who bonâ fide and without notice of a prior act of bankruptcy had seized under a fi. fa., was liable to the assignees in trover for selling after the fiat, the execution being founded on a warrant of attorney. This decision was arrived at on the ground that the 108th section affected the operation of the writ, and did not merely direct the application of the money levied under it,—the words "no creditor shall avail himself of such execution" being held to mean that such an execution should not be carried into effect for the benefit of the creditor. The same point which had arisen in *Goldschmidt* v. *Hamlet* (1) came before the Court of Queen's Bench in *Graham* v. *Witherby* (3), when that Court, after taking time to consider its decision, followed the previous cases, and held that, where the execution was founded on a warrant of attorney, the effect of sect. 108 was to make a sale by the sheriff after the fiat illegal, and so to let in a subsequent execution creditor on a judgment in an adverse bonâ fide action, who had seized before the fiat, and that the section did not merely transfer the produce of the sale from the first judgment creditor to the assignees. These cases, however, are not applicable to the case now under discussion, first, because in those cases there was a subsequent sale by the sheriff which was invalidated by the express words of the section, "no creditor shall avail himself" of such execution; and secondly, because, if the first execution was void, the subsequent one having been executed by seizure before the fiat was within the exception contained in the 108th section.

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(1) 6 M. & G. 190.

(2) 12 M. & W. 111.

(3) 7 Q. B. 491.

In this case, on the contrary, there are no words in s. 46, sub-s. 2, which invalidate the sale by the sheriff, and indeed under that clause the sale must necessarily take place before it can be known whether the execution creditor will or will not ultimately be entitled to the proceeds; and secondly, the words of the statute do seem to imply that the benefit of the execution is to be transferred from the execution creditor to the trustee for the benefit of the creditors generally. As soon as the sheriff has sold he holds the proceeds of the sale for the execution creditors in the order of their priority, and the section simply provides that, instead of handing this money over to the execution creditor whose judgment exceeds 20*l.*, the sheriff shall hand it over to the trustee. If the sale is not invalidated, but merely the proceeds are transferred from the execution creditor whose judgment is over 20*l.* to the trustee, it follows that the sheriff in this case never sold under the applicant's writ, and never had in his hands any money to the use of the applicant, and the applicant is only an execution creditor who has seized but has not sold, and whose execution consequently is avoided by s. 45.

The case of *Ex parte Lovering* (1), which was decided under the Act of 1869, is also distinguishable; for in that case the execution creditor got a security by seizure which there was nothing in the Act to take from him. Under the present Act the execution creditor gets no benefit by seizure alone. He must complete his execution by sale before the date of the receiving order. In this case the sheriff sold under the three first executions, and held the proceeds for those creditors only, and not for the present applicant. Nor is there any injustice in this result. At Common Law the applicant would have got nothing by his execution; and although where the judgment is over 20*l.*, the legislature has thought fit to take from the execution creditor the benefit of the execution and give it to the creditors at large, it is impossible to understand what justice there could be in taking away from an execution creditor on a judgment over 20*l.* the benefit of his execution, not to give it to the creditors at large, but to give it to execution creditors on judgments under 20*l.* It is impossible

(1) Law Rep. 17 Eq. 452.

to conceive why the one kind of judgment creditors should be favoured at the expense of the others.

This motion, therefore, must be refused with costs.

Order accordingly.

Solicitors for execution creditor: *Walker & Mewburn-Walker.*
Solicitor for trustee: *W. W. Aldrige.*

H. L. F.

[IN THE COURT OF APPEAL.]

April 17.

MEAGER *v.* PELLEW.

Husband and Wife—Judgment Summons—Order for Payment—Separate Estate—Restraint on Anticipation—Debtors Act, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5.

Upon a judgment summons issued under s. 5 of the Debtors Act, 1869, against a married woman who has only separate estate which she is restrained from anticipating, an order for payment cannot be made unless it is shewn that, since the date of the judgment, she has received some of her separate income.

If in the judgment execution is limited to separate estate which she is not restrained from anticipating, *quære,* whether s. 5 of the Debtors Act, 1869, applies at all.

Dillon v. *Cunningham* (Law Rep. 8 Ex. 23) distinguished.

APPEAL from the dismissal of a judgment summons by Field, J.

On the 30th of October, 1884, A. G. S. Meager commenced an action in the Queen's Bench Division against G. H. L. Pellew and his wife, to recover the sum of 400*l.*, with interest thereon, due to the plaintiff on a joint and several promissory note of the defendants dated the 7th of June, 1884. On the 12th of December, 1884, the plaintiff recovered judgment against the defendants for 469*l.*, principal and interest, and 8*l.* 1*s.* taxed costs. The judgment provided that execution against the female defendant was to be limited to such separate estate as she was not restrained from anticipating, unless such restraint should be under settlement of her own property made by herself. On the 18th of December the plaintiff issued a judgment summons, calling on the defendants to appear personally at the Court sitting in Bankruptcy on the 7th of February, 1885, "to be examined by the Court touching the means you have or have had since the date of the judgment to pay the said sum in which you have made default in payment, and also to shew cause why you should not be committed to prison for such default."

The summons was heard by Field, J., on the 10th of February, 1885. In support of it the plaintiff, on the 7th of February, made an affidavit, in which he stated that the judgment remained wholly unsatisfied. And he said that, under and by virtue of an indenture of settlement dated the 10th of February, 1871, the female defendant was entitled to, and, as he was informed and believed, was in receipt of the interest and dividends arising from a sum of 5000*l.* settled on her by the said deed, and that she was further entitled under the said deed to the yearly sum of 100*l.*, and was then, as he was informed and believed, in receipt of such yearly sum of 100*l.* It appeared that the income to which the wife was entitled under the settlement was payable to her for her separate use without power of anticipation. It was not shewn that she had received any of the income since the date of the judgment, but a half-yearly payment of the annuity of 100*l.* would become due on the 11th of February, 1885.

The husband had filed a liquidation petition, and no order was asked against him. Field, J., refused to make any order, on the ground that an order for payment by the wife, before she had actually received any income, would be an anticipation of her income.

The plaintiff appealed.

Winslow, Q.C., and *Bremner*, for the appellant. The order ought to have been made as asked for. Sect. 5 (1) of the Debtors

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(1) Sect. 5. "Subject to the provisions hereinafter mentioned, and to the prescribed rules, any Court may commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt, or instalment of any debt, due from him in pursuance of any order or judgment of that or any other competent Court.

"Provided, inter alia, (2.) That such jurisdiction shall only be exercised where it is proved to the satisfaction of the Court that the person making default either has, or has had since the date of the order or judgment, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same.

"Proof of the means of the person making default may be given in such manner as the Court thinks just; and for the purposes of such proof the debtor and any witnesses may be summoned and examined on oath, according to the prescribed rules."

Act, 1869, applies to married women. At the time when the Act was passed, a married woman could have been arrested on a ca. sa., and s. 5 was intended as a substitute for imprisonment for debt. The application to Field, J., was only for an order in general terms against the wife for payment, not for payment at any specific time, but when she should have the means of paying. The object is to compel her to pay within a reasonable time after she has received her income. The application was made the day before her half-yearly income was receivable. In *Dillon* v. *Cunningham* (1), judgment having been recovered against a married woman on her promissory note given after her marriage, a judgment summons was issued against her by the plaintiff, and on proof that the defendant had property settled to her separate use (without power of anticipation) to the amount of 1500*l.* a year, the income of which was payable in January and July, an order was made on her by Quain, J., in November for payment of the judgment debt by two instalments in the following January and July, and the order was affirmed by the Court of Exchequer.

[BRETT, M.R. The question of anticipation does not appear to have been dealt with by the Court there.

BOWEN, L.J. It is only a decision that, on an application by a judgment creditor under s. 5 of the Debtors Act for an order for payment by instalments by the defendant, proof of the defendant's means need not be given. And in that case the defendant had not pleaded coverture. I take it that the judgment was in the ordinary form of judgment against a defendant who was not a married woman.

BAGGALLAY, L.J., referred to *Pike* v. *Fitzgibbon* (2), in which it was held that the general engagements of a married woman can be enforced only against so much of the separate estate to which she was entitled, free from any restraint on anticipation, at the time when the engagements were entered into, as remains at the time when judgment is given.]

Having regard to the object of the Debtors Act, which was to abolish imprisonment for debt, to which married women were liable, an order for payment can be made against a married woman under s. 5.

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(1) Law Rep. 8 Ex. 23.

(2) 17 Ch. D. 454.

[BOWEN, L.J. Would she have been liable to arrest on a judgment in the form adopted in the present case? Does s. 5 apply to such a judgment?]

Since the Married Women's Property Act the judgment against a married woman is a personal judgment, though the execution may be limited to separate estate as to which there is no restraint of anticipation.

R. O. B. Lane, for the defendant, was not heard.

BRETT, M.R. All we have to decide now is whether the application was not made to Field, J., too soon. All that could be said in support of it was that a judgment had been obtained against a married woman, execution being expressly limited to such separate estate as she was not restrained from anticipating, and that the judgment had not been satisfied. There was no evidence of her having any separate estate but that in respect of which she was restrained from anticipation, and the application was made at a time at which it could not be shewn that she had received any of her income since the date of the judgment. The plaintiff did not, therefore, shew that she had made any default in obeying the judgment; she could not obey it until she had received that income which she was restrained from anticipating. If she had made a promise to pay the debt before she had received her income she would have been anticipating it. The plaintiff was asking the judge to do that which the defendant herself was not allowed to do—to anticipate her income. I doubt whether the case comes within s. 5 of the Debtors Act at all. But, if it does, the application was premature.

BAGGALLAY, L.J. I am entirely of the same opinion. It is unnecessary to say whether the application would have been successful if it had been made after the wife had received her income. But I am by no means satisfied that it would.

BOWEN, L.J. I am of the same opinion.

Solicitor for plaintiff: *P. H. Beer.*
Solicitors for defendant: *Lickorish & Bellord.*

W. L. C.

END OF VOL. XIV.

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In the First Series,
28 Ch. D.

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14 Q. B. D. 10 P. D.

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2. —— *Sale of Food and Drugs Act,* 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Article not of "nature, substance, and quality" demanded.*] The Sale of Food and Drugs Act, 1875, after reciting that it is desirable to amend the law regarding the sale of food and drugs in a pure and genuine condition, provides by s. 6 that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser under a penalty :—*Held*, that s. 6 was not limited in its application to sales of adulterated articles, but that it applied also to cases in which the article sold was unadulterated but wholly different from that demanded by the purchaser. Knight *v.* Bowers - - - 845

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BAKER—*continued.*

enacts that every baker beyond certain metropolitan limits who shall "carry out bread for sale in and from any cart" shall be provided with a correct beam and scales with proper weights, in order that all bread sold by him may be weighed in the presence of the purchaser; and in case any such baker shall "carry out or deliver any bread" without being provided with such beam and scales with proper weights, he shall be liable to a penalty. Ridgway *v.* Ward - - 110

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2. —— *Appeal—Preliminary Objection—Notice—Costs.*] A respondent to an appeal who intends to rely on a preliminary objection ought to give notice to the appellant of his intention so to do.—If he does not, and the objection is successful, the appeal will be dismissed without costs.—*In re Speight* (13 Q. B. D. 42) followed. Ex parte Blease. In re Blinkhorn - 123

3. —— *Bankruptcy Notice—Final Judgment—Judgment for Costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*g*).] At the trial of an action in the Chancery Division, upon motion for judgment in default of pleading, judgment was given ordering and adjudging that the defendant should be perpetually restrained from practising as a solicitor at Liverpool or otherwise in violation of his covenant with the plaintiff. And the Court declared that the partnership between the plaintiff and the defendant ought to be dissolved as from the date of the plaintiff's notice, and ordered and decreed the same accordingly. And it was ordered that an inquiry should be made what was the amount of the damages which the plaintiff had sustained by reason of the defendant's breach of covenant, and that the defendant should, within fourteen days from the date of the chief clerk's certificate, pay the amount of the damages, when certified, to the plaintiff. And it was ordered that the defendant should pay to the plaintiff his taxed costs of the action. The costs were taxed and were partly paid by the defendant. The inquiry as to damages was not prosecuted:—*Held*, that the order for the payment of costs was a "final judgment" within the meaning of s. 4, sub-s. 1 (*g*), of the Bankruptcy Act, 1883, and that the plaintiff was entitled to serve the defendant with a bankruptcy notice for the unpaid balance of costs.—*Ex parte Chinery* (12 Q. B. D. 342) explained. Ex parte Moore. In re Faithful - - - C. A. 627

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4. —— *Bankruptcy Petition—Act of Bankruptcy — Failure to comply with Bankruptcy Notice to pay Judgment Debt—Appeal pending from Judgment—Staying Proceedings—Discretion of Registrar—Appeal—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 4.] The Court of Appeal will not interfere with the exercise of discretion by the registrar, under sub-s. 4 of s. 7 of the Bankruptcy Act, 1883, in adjourning the hearing of, or dismissing, a bankruptcy petition founded on non-compliance with a bankruptcy notice in respect of a judgment debt, when an appeal is pending from the judgment, unless it is clear that the registrar could not have been right.—If the appeal appears to be a bonâ fide one, the hearing of the bankruptcy petition ought to be adjourned.—If the appeal is evidently frivolous, a receiving order ought to be made, notwithstanding its pendency. Ex parte Heyworth. In re Rhodes - - - - C. A. 49

5. —— *Bankruptcy Petition by Creditor — Signature — Signature by Attorney—Bankruptcy Rules*, 1883, *r.* 125—*Appendix, Form No.* 10.] A bankruptcy petition by a creditor may be signed on his behalf by his duly constituted attorney.—A power of attorney authorized the attorney (inter alia) "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings touching anything in which I or my ships or other personal estate may be in anywise concerned":—*Held*, that this power authorized the attorney to sign on behalf of his principal a bankruptcy petition against a debtor of the principal. Ex parte Wallace. In re Wallace - - - - - C. A. 22

6. —— *Bill of Exchange—Specific Appropriation of Remittances—Judicial Insolvency of Drawer and Acceptor—Application of Remittances remaining in Specie—Rule in Ex parte Waring* (19 Ves. 345).] Bankers in London granted to merchants in Ceylon a letter of credit, authorizing the merchants to draw on them at three, four, or six months sight, for any sums not exceeding 10,000*l.* at one time, the drafts to be covered within two, three, or five months (according as they had been issued at three, four, or six months), by remittances on good London houses. And the bankers thereby agreed with the merchants, and also, as a separate engagement, with the bonâ fide holders respectively of the bills, that the bills should be duly accepted on presentation, and paid at maturity. The course of dealing between the parties was this—if the remittances sent as cover for the merchants' drafts matured later than the drafts accepted, interest was debited by the bankers against the merchants from the date of the maturity of the acceptances to that of the maturity of the remittances, while, if the remittances matured earlier than the acceptances, interest was credited to the merchants. In all cases the bankers dealt with the remittances as they thought expedient, and the proceeds were paid into the general banking account of their firm. Under this letter of credit a number of bills were drawn by the merchants on the bankers, and were accepted by them, and other bills were remitted by the merchants to cover the acceptances, the letters which accompanied the remittances always

BANKRUPTCY—*continued.*

describing them as sent to cover particular drafts which were specified in the letters. The bankers stopped payment and filed a liquidation petition, under which a trustee was afterwards appointed. In consequence of their stoppage the merchants also stopped payment. At the date of the liquidation petition acceptances under the letter of credit to the amount of 11,535*l.* were outstanding, to meet which the bankers had received from the merchants remittances to the amount of 3009*l.*, of which two bills remained in specie in the hands of the bankers, the others having been converted by them into cash. After the filing of the petition two other bills, which had been posted by the merchants before they knew of the stoppage of the bankers, came into the hands of the receiver appointed under the petition. The merchants' firm consisted of two partners, one of whom was insane, and resident in Germany. The sane partner procured an adjudication of insolvency against himself in Ceylon, and under this insolvency an assignee was appointed. The sane partner deposed that "under this insolvency my estate, and also the estate of my firm, so far as legally can be, is now being administered," and this evidence was not contradicted:—*Held*, that the joint estate of the merchants, as well as that of the bankers, was under a forced administration, and that consequently the rule in *Ex parte Waring* (19 Ves. 345) applied.—*Held*, therefore, that the proceeds of the four remitted bills which were in specie at the commencement of the liquidation must be applied, not in paying the whole of the acceptances rateably, nor in paying rateably all those acceptances to meet which remittances had been sent before the filing of the liquidation petition, but in paying those acceptances to meet which the four bills had been appropriated by the letters with which they were sent.—When remittances are sent under such circumstances to cover drafts of the remitter accepted by the remittee, the remittee may, so long as he is solvent, be entitled, by mercantile usage or the course of dealing between the parties, to deal with the remittances as he pleases; but, so soon as he becomes insolvent, the remitter is entitled to insist on having the remittances applied in paying the acceptances, and that right is the foundation of the rule in *Ex parte Waring* (19 Ves. 345), but the right extends only to those remittances which remain in specie at the date of the insolvency. EX PARTE DEVER. IN RE SUSE. (No. 2.) - - - **C. A. 611**

7. —— *Costs as between Solicitor and Client—Bankruptcy Rules*, 1883, *r.* 98.] Rule 98 of the Bankruptcy Rules, 1883, only empowers the Court to direct that costs shall be taxed and paid as between solicitor and client at the time when the order is made awarding the costs. If such a direction is not given at that time, the Court has no power to give it subsequently. EX PARTE SHOOLBRED. IN RE ANGELL - - **C. A. 298**

8. —— *Creditor's Deed—Act of Bankruptcy—Subsequent Bankruptcy of Debtor—Liability of Trustee under Deed to account to Trustee in Bankruptcy.*] When the trustee under a creditors' deed takes possession of the debtor's property and carries on his business under the provisions of the deed, and the debtor is subsequently adjudicated a bankrupt on the act of bankruptcy committed by the execution of the deed, the trustee in the bankruptcy must elect to treat the trustee under the deed either as a trespasser or as his agent. If he elects to treat him as a trespasser, the trustee under the deed must deliver up to him all the property of the bankrupt of which he took possession, and which remains in his possession unconverted, and must pay him the value of that property which he has converted. EX PARTE VAUGHAN. IN RE RIDDEOUGH - - - - - **25**

9. —— *Discharge of Bankrupt—Condition—Contracting Debt without reasonable or probable Ground of Expectation of being able to pay it—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-s.* 3 (*c*).] Two partners, who had no capital of their own, commenced business by means of borrowed money, assigning to the lender as security their leasehold premises, the goodwill of their business, and all their existing and after-acquired stock-in-trade, fixtures, furniture, and book-debts, giving him power to take possession at any time. They contracted debts in carrying on the business, and became bankrupts. The mortgagee took possession under his deed, and his security was insufficient. The registrar granted the bankrupts a discharge, on condition of their consenting to judgment being entered up against them by the trustee for the whole of the debts provable in the bankruptcy:—*Held*, that the bankrupts had contracted debts without having at the time of contracting them any reasonable or probable ground of expectation of being able to pay them, and that the registrar's decision was right. EX PARTE WHITE. IN RE WHITE **C. A. 600**

10. —— *Order of Discharge—Condition—"Rash and hazardous speculations"—Conduct of Bankrupt before Commencement of Act—Retrospective Effect of Act—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28—*Costs—Appeal.*] Upon an application by a bankrupt under s. 28 of the Bankruptcy Act, 1883, for an order of discharge, the Court may take into consideration conduct of the bankrupt of the nature mentioned in sub-s. 3, though it took place before the commencement of the Act, and in that sense s. 28 is retrospective.—*In re White* (9 L. T. (N.S.) 702) explained and distinguished.—A solicitor who had no capital of his own bought land in the city of London by means of money which he borrowed on the security of mortgages of the land, his intention being to sell at an advanced price. He afterwards borrowed more money on a further mortgage for the purpose of building on the land. The land was valued by professional valuers at considerably more than the amount borrowed. He was unable to sell or let to the property, and he became a bankrupt:—*Held*, that he had been guilty of "rash and hazardous speculations," and that the registrar was right in granting him an order of discharge subject to the condition that, after setting aside out of his earnings 300*l.* a year for the maintenance of himself and his family, he should pay over to the official receiver the balance of his earnings, until he should have paid 10*s.* in the pound on all the debts which had been, or might be, proved in the bankruptcy.—Creditors served with notice of an appeal

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by a bankrupt from an order granting him a conditional discharge will not be allowed their costs of appearing on the hearing of the appeal when the official receiver or trustee appears. Ex parte Salaman. In re Salaman - - **C. A. 936**

11. —— *Setting aside "Salary or Income" of Bankrupt for Creditors—Future Earnings of Professional Man—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 90.] The word "income" in s. 90 of the Bankruptcy Act, 1869, applies only to an "income" ejusdem generis with a "salary," and does not enable the Court to set aside for the benefit of the creditors of a professional man, who is an undischarged bankrupt, any part of his prospective and contingent earnings in the exercise of his personal skill and knowledge. Ex parte Benwell. In re Hutton - - **C. A. 301**

12. —— *Husband and Wife—Wife's Chose in Action—Ante-nuptial Parol Agreement to settle—Part Performance—Statute of Frauds, s.* 4—*Gift by Husband to Wife—Bankruptcy of Husband—Title of Trustee.*] On a marriage it was verbally agreed between the husband and the wife that a sum of money standing to the credit of the wife on deposit at a bank in her maiden name should be her separate property. Nothing further was done; but after the marriage the money, with the husband's consent, remained at the bank in the wife's maiden name; and she received the interest on it for two years after the marriage, when she drew the money out of the bank. The trustee in the subsequent liquidation of the husband having claimed payment of the money from the wife as part of her husband's property:—*Held*, by Cave, J., that there had been no such part performance by the husband of the parol contract to settle as to take the case out of the Statute of Frauds, and, therefore, that the trustee was entitled to the money subject to the wife's equity to a settlement, if any.—*Held*, by the Court of Appeal, without deciding the question on the Statute of Frauds, that there had been a gift of the money by the husband to the wife after the marriage; that he had become a trustee of it for her as her separate property; and that, consequently, it did not pass to the trustee on his liquidation. Ex parte Whitehead. In re Whitehead - - . - - **C. A. 419**

13. —— *Judgment Summons—Committal—Order to pay Debt by Instalments—"Means to pay"—Money arising from Gift—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5, *sub-s.* 2.] Per Cotton and Lindley, L.JJ.:—For the purpose of determining whether a judgment debtor has had "the means to pay" the judgment debt, with the view of making an order for his committal under sub-s. 2 of s. 5 of the Debtors Act, 1869, money derived from a gift may be taken into account. It is not necessary that the "means to pay" should have been derived from the debtor's earnings, or from a fixed income. Ex parte Koster. In re Park - - - **C. A. 597**

14. —— *Agreement for a Lease—"Land burdened with onerous covenants"—"Property"—Disclaimer—Bankruptcy Act*, 1883, *ss.* 44, 55, 168.] The right of disclaimer conferred on trustees by s. 55 of the Bankruptcy Act, 1883, is not limited to property of the bankrupt divisible amongst his creditors as defined by s. 44, but extends to any property as defined by s. 168 from which no benefit can accrue to the bankrupt's estate.—A debtor held his business premises for a term of years under an agreement for a lease, and entered into a binding contract for the sale and assignment of his business and his business premises to a company, but became bankrupt before the completion of the contract:—*Held*, that the debtor's interest in the agreement for a lease was in the nature of land burdened with onerous covenants which his trustee in bankruptcy could under the circumstances disclaim. In re Maughan. Ex parte Monkhouse - - - **956**

15. —— *Disclaimer of Lease—Landlord's Claim for Compensation—Jurisdiction—Bankruptcy Act*, 1883, *ss.* 51, 121—*Bankruptcy Rules*, 1883, *r.* 232.] Where an order is made under s. 121 of the Bankruptcy Act, 1883, for the summary administration of a bankrupt's estate, and the trustee in pursuance of the power conferred on him by rule 232 of the Bankruptcy Rules, 1883, disclaims, without any application to the Court, the leasehold premises of the bankrupt, the Court has no jurisdiction to give any compensation to the landlord out of the bankrupt's estate for the use and occupation by the trustee of the leasehold premises for the purposes of the bankruptcy, even although a benefit has thereby resulted to the estate. In re Sandwell. Ex parte Zerfass - - - - **960**

16. —— *Disclaimer of Leaseholds—Mortgagee—Superior Landlord—Form of Order—Bankruptcy Act*, 1883, *s.* 55, *sub-s.* 6.] On a disclaimer of leaseholds by a trustee in bankruptcy under sub-s. 6, s. 55, of the Bankruptcy Act, 1883, the landlord has not such an interest in the "disclaimed property" as to be entitled to a vesting order under the sub-section. The right to a vesting order is only conferred on a person claiming an interest in the property though or under the bankrupt. Where in such a case a mortgage does not appear on the trustee's application to disclaim, the proper course is to order that the mortgagee be excluded from all interest in and security upon the property, unless he shall by a short date declare his option to take a vesting order in the terms of the sub-section. In re Parker and Parker (1). Ex parte Turquand [405

17. —— *Liquidation—Removal of Trustee by Court—Jurisdiction—Discretion of Registrar—"Cause shewn"—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 83 (*Vide Bankruptcy Act*, 1883, *ss.* 84, 86.)] The power given to the Court by sub-s. 4 of s. 83 of the Bankruptcy Act, 1869, to "remove any trustee upon cause shewn," authorizes the removal of one of several co-trustees without the removal of all. "Cause shewn" does not mean only conduct amounting to fraud or dishonesty on the part of the trustee; it is enough to prove conduct—such as vexatious obstruction of the realization of the estate in the interest of the debtor—which shews that it is no longer fit that the trustee should remain a trustee. Though the making of an order to remove a trustee is not a matter of pure discretion, and the Court of Appeal is bound to see that cause was

BANKRUPTCY—*continued.*
shewn in order to found the jurisdiction of the registrar, yet if the facts are capable of two reasonable interpretations, the Court of Appeal will trust to the discretion of the registrar in determining which is the more reasonable interpretation of the two, and will not disturb his order for the removal of a trustee, he, from his acquaintance with the proceedings throughout, having far better means of judging than the Court of Appeal has. Ex parte Newitt. In re Mansel. [**C. A.** 177

18. —— *Liquidation by Arrangement—Release and Discharge of Trustee—Power of Board of Trade to require Account—Bankruptcy Act*, 1869, *s.* 126—*Bankruptcy Act*, 1883, *s.* 102, *sub-s.* 5, *s.* 162, *sub-s.* 2.] A trustee under the Bankruptcy Act, 1869, who has obtained his statutory release and discharge under that Act, after the 25th of August, 1883 (the date of the passing of the Bankruptcy Act, 1883), is not thereby relieved from rendering an account to the Board of Trade of his receipts and payments as such trustee if, on that date, he had in his hands any undistributed funds, although such funds may have been disposed of by a subsequent resolution of the creditors. In re Chudley. Ex parte Board of Trade - - - - - - - 402

19. —— *Mutual Dealings—Bill accepted and paid by Creditor after Notice of Debtor's Bankruptcy — Set-off — Bankruptcy Act*, 1883, *s.* 38.] Where there are mutual dealings between a debtor and his creditors, the line as to set-off must, as a general rule, and in the absence of special circumstances, be drawn at the date of the commencement of the bankruptcy. In re Gillespie. Ex parte Reid & Sons - - - - - 963

20. —— *Partnership — Deceased Partner — Trust of Real Estate to pay Debts—No Real Estate —Debts Statute-barred—Bankruptcy of continuing Partners—Proof by Executors of Deceased Partner —Proof by Executors of Deceased Partner—Rule against proving in Competition with one's own Creditors*,] A devise of real estate upon trust to pay debts does not prevent the operation of the Statute of Limitations when the testator leaves no real estate to support the trust. A., B. and C. carried on business in co-partnership. In 1875, A. retired from the firm, his share being purchased by B. and C., the continuing partners. On his retirement, A., at the request of the continuing partners, paid certain mortgage debts of the business, and took transfers to himself of these mortgage debts with the securities for the same. He also at their request lent them money on mortgage of other portions of the partnership property. He died in 1876. B. and C. continued the business until 1883, when they became bankrupt. At this time there were cash creditors of the old firm still unpaid, who carried in proofs against the joint estate of B. and C. The executors of A. also carried in a proof against the separate estates of B. and C., for (1) the balance of the purchase-money of A.'s share; (2) the mortgage debts paid off by A. on transfer to himself; (3) the moneys lent by A. on mortgage after his retirement. This proof was rejected by the trustee on the ground that to admit it would infringe against the rule forbidding a partner to prove in competition with his own creditors:—*Held*, that as the debts proved by the cash creditors were, as against A.'s estate, statute-barred, the rule did not apply, and that the proof must be admitted. In re Hepburn. Ex parte Smith - - - - - - - 394

21. —— *Petition — Petitioning Creditor — Trustee for absolute Beneficial Owner—Joining Equitable Owner of Debt—Amendment of Petition —Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, *sub-s.* 1 (*g*), 5, 6, 105 (*sub-s.* 3).] Under the Bankruptcy Act, 1883, as under the Bankruptcy Act, 1869, a mere trustee of a debt for an absolute beneficial owner is not entitled to present a bankruptcy petition against the debtor unless the cestui que trust, if capable of dealing with the debt, joins as a co-petitioner.—*Ex parte Culley* (9 Ch. D. 307) followed.—When an act of bankruptcy has been committed by the failure of a debtor to comply with a bankruptcy summons, any creditor may avail himself of it for the purpose of presenting a bankruptcy petition against the debtor; the right to petition is not limited to the creditor who has served the bankruptcy notice.—A bankruptcy petition having been presented by a bare trustee of a debt, and dismissed on the ground that the cestui que trust ought to have been joined as a petitioner, leave was given by the Court of Appeal (though more than three months had elapsed since the presentation of the petition) to amend it by joining the cestui que trust, with her consent, but the appellant was ordered to pay the costs of the appeal, and the costs (if any) occasioned by the amendment. Ex parte Dearle. In re Hastings - **C. A.** 184

22. —— *Practice — Disclaimer — Landlord's Notice— Trustee's Neglect — Costs — Bankruptcy Act*, 1883, *s.* 55, *sub-s.* 4.] When a landlord gives a trustee notice under sub-s. 4 of the 55th section of the Bankruptcy Act, 1883, requiring him to decide whether he will disclaim or not the bankrupt's leaseholds, and the trustee declines or neglects within the twenty-eight days limited by the sub-section to give notice whether he disclaims or not, and subsequently applies to the Court for leave to disclaim, he may render himself personally liable to the payment of rent and costs. In re Page Brothers. Ex parte Mackay - - - - - - 401

23. —— *Practice — Rejection of Proof by Trustee—Appeal—Notice of Motion—Bankruptcy Rules*, 1883, *rr.* 19, 174.] If a creditor desires to appeal against the rejection of his proof by the trustee he must give notice of motion in the usual way under r. 19 of the Bankruptcy Rules, 1883, and within the twenty-one days limited by the 174th rule. The old practice of applying to the Court, in the first instance, to fix a time and day for hearing such an application no longer obtains. In re Gillespie. Ex parte Morrison - 385

24. —— *Proof—Judgment Debt—Evidence.*] When in support of a claim to prove a debt in a bankruptcy the only evidence of the debt is a judgment, and that judgment has been obtained after the act of bankruptcy, the judgment debt cannot be proved. Ex parte Bonham. In re Tollemache - - - - **C. A.** 604

BANKRUPTCY—*continued.*

25. —— *Proof of Debt—Evidence—Admissibility—Admission by Dead Man against Interest—Bankrupt's Statement of Affairs—Judgment Debt—Inquiry into Consideration.*] In order that an admission made by a dead man may be admissible in evidence on the ground that it was against his interest, it must have been actually against his interest at the time when it was made; it is not sufficient that it might possibly turn out afterwards to have been against his interest.—An admission made by a bankrupt in his statement of affairs that a debt is due from him, is not after his death admissible evidence as against his assignee in bankruptcy of the existence of the debt, merely because it might turn out that there was a surplus after paying the creditors. Ex parte Edwards. In re Tollemache - - - - - **C. A.** 415

26. —— *Proof of Debt—Judgment Debt—Proof of Consideration—Evidence of Judgment.*] When a claim is made to prove in a bankruptcy in respect of a judgment debt, though the judgment is primâ facie evidence of the debt, it is not conclusive evidence, and, if the circumstances are suspicious, the Court will call upon the claimant to prove the consideration for the judgment, and if he is unable to prove it, by reason of the loss of documents, or the lapse of time or otherwise, the proof will be rejected.—A judgment may be proved by the production of a duly certified copy of an entry in the entry book of judgments of the Court in which the judgment was recovered. Ex parte Anderson. In re Tollemache [**C. A.** 606

27. —— *Official Receiver—His Powers and Duties—Power of Sale—Bankruptcy Act,* 1883, *ss.* 9, 10, 21, 54, 56, 68–70.] After an adjudication and pending the appointment of a trustee by the creditors, the official receiver, although he is "the trustee for the purposes of the Act," has no power, mero motu, to sell the bankrupt's property; but his powers and duties are under s. 70 of the Act limited to those of a receiver and manager appointed by the High Court.—Whether he could sell by virtue of an order of the Board of Trade under sub-s. 2 of s. 70, *quære.* In re Parker & Parker (2). Ex parte Turquand [407

28. —— *Receiving Order—Jurisdiction—Petition presented in wrong Court—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 95, 97.] If a bankruptcy petition is by inadvertence presented in a wrong bankruptcy court, the court to which it is presented has jurisdiction to make a receiving order.—If, however, the petition is wilfully presented in a wrong court, this is a ground for dismissing it.—The Divisional Court made a receiving order, which it held that the county court ought to have made, and to which the debtor had raised no other objection than want of jurisdiction, giving leave to the debtor to apply afterwards to the Divisional Court to discharge the order on any ground arising since the hearing in the county court. Ex parte May. In re Brightmore - - - - - 37

BANKRUPTCY—*continued.*

29. —— *Relation back of Trustee's Title—Assignment of Debt—Ship—Building Contract—Completion by Trustee.*] A shipbuilder agreed to build a vessel, the price to be paid in specified instalments. Part of the work having been done, but less than the value of such part having been paid to the builder, he charged in favour of a creditor the instalment due to him on the delivery of the vessel. Before the ship was completed he became bankrupt. The trustee in the bankruptcy completed the vessel, and in so doing expended less than the amount which remained to be paid by the purchaser:—*Held*, that the charge, being upon money which had been already earned by the builder, was valid as against the trustee.—*Ex parte Nicholls* (22 Ch. D. 782) and *Tooth* v. *Hallett* (Law Rep. 4 Ch. 242) distinguished. Ex parte Moss. In re Toward - - - **C. A.** 310

30. —— *Relation back of Trustee's Title—Payment of Bankrupt's Money to procure Withdrawal of Criminal Prosecution—Illegal Consideration—Right of Trustee to recover from Payee.*] A banking company commenced a prosecution against a customer for having obtained credit from them under false pretences, which is, by s. 13 of the Debtors Act, 1869, made a misdemeanour. At this time the bank had notice of an act of bankruptcy committed by the customer. On the day on which the summons was to be heard by the magistrate, H. (whose wife was an aunt of the customer's wife) signed an undertaking that, if the magistrate would allow the summons to be withdrawn, he would pay the bank the sum which the customer had obtained from them by false pretences. An application was made to the magistrate by the customer's solicitor to allow the summons to be withdrawn. The application was assented to by the bank's solicitor and was granted by the magistrate. H. then paid the money to the bank. The bank manager believed that H. was paying the money out of his own pocket. The customer was soon afterwards adjudicated a bankrupt, upon the act of bankruptcy of which the bank had notice. The trustee in the bankruptcy discovered that the money which H. had paid to the bank had been previously handed to him by the bankrupt's wife, she having, with the bankrupt's knowledge, taken it for the purpose of paying the bank out of a bag of money belonging to the bankrupt:—*Held*, that, the consideration for the payment to the bank being the stifling of a prosecution, there was no legal consideration, and that, though H., being in pari delicto, could not have recovered the money from the bank, the trustee, to whom, by virtue of the relation back of his title to the act of bankruptcy, the money really belonged, could recover it.—*Ex parte Caldecott* (4 Ch. D. 150) distinguished.—Leave to appeal to the Court of Appeal refused. Ex parte Wolverhampton Banking Co. In re Campbell - - - 32

31. —— *Property passing to Trustee—Reputed Ownership—Wife's Separate Property in Possession of Husband—Marriage Settlement made in Foreign Country.*] The rule that a husband is a trustee for his wife of her separate property when no other trustee has been appointed, applies to that which becomes her separate property by virtue of a marriage contract entered into in a foreign country.—When, therefore, such property

BANKRUPTCY—*continued.*

is in the possession of a husband at the commencement of his bankruptcy it does not pass to his trustee. Ex parte Sibeth. In re Sibeth [C. A. 417

32. —— *Reputed Ownership—Trade Custom—Hiring of Furniture—Hotel Keeper—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 44, *sub-s.* 3—*Bill of Sale—Registration—Transfer of Registered Bill of Sale—Equitable sub-Mortgage—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 10.] The custom for hotel-keepers to hire the furniture of their hotels is so notorious, and has been so often proved, that it need not now be proved, but the Court will take judicial notice of it. And the custom extends, not only to furniture in the strictest sense of the word, but to all the articles which are necessary for the furnishing of an hotel for the purpose of using it as an hotel.—The effect of the custom is absolutely to exclude the reputation of ownership by the hotel-keeper of all those articles in the hotel, at the time of his bankruptcy, which are within the scope of the custom, without regard to the question whether the particular articles are or are not in fact hired by him.—Consequently, articles which are his property subject to a mortgage by bill of sale, will be excluded from the operation of the reputed ownership clause.—A memorandum by way of equitable sub-mortgage given by the transferee of a registered bill of sale, accompanied by a deposit of the registered bill of sale and the transfer, does not require registration as a bill of sale under the Bills of Sale Act, 1878, even though, after the mortgage, the transferee acquires by assignment the equity of redemption of the original grantor. Ex parte Turquand. In re Parker C. A. 636

33. —— *Residential Estate—Home Farm—Farming and Market Gardening for Pleasure—Live and Dead Stock—Bill of Sale—Order and Disposition—"Trade or Business"—Bankruptcy Act*, 1883, *s.* 44.] A person who occupies a residential property and engages in farming and market gardening for his pleasure, and carries on the same at a profit, is not carrying on a "trade or business" within the meaning of s. 44 of the Bankruptcy Act, 1883, even although he sells his surplus produce after supplying his household.—But if the primary intention is abandoned, and the business is carried on with a view to profit as a means of livelihood, he will come within the mischief of the section. In re Wallis. Ex parte Sully - - - - - - 950

34. —— *Secured Creditor—Valuation of Security—Amendment of Proof—Second Mortgagee—Notice of Appeal—Time—Notice sent by Post—Trustee—Costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 142; *Schedule* 2, *r.* 13—*Bankruptcy Rules*, 1883, *rr.* 112, 114 *A.*, 116 *A.* [*Rules of* 11*th of April*, 1884]—*Rules of Supreme Court*, 1883, *Order LVIII. r.* 15]. If notice of a bankruptcy appeal is sent by post, as provided by s. 142 of the Bankruptcy Act, 1883, *quære* whether the notice will be in time unless the letter is received by the respondent before the expiration of the twenty-one days limited for appealing.—A mortgagee who has valued his security will in a proper case be allowed, under r. 13 in schedule 2 to the Act, to amend his valuation and proof, notwithstanding the opposition of a subsequent mortgagee.—A trustee in bankruptcy who is served with notice of an appeal, and who appears and only asks for his costs, will not be allowed his costs of appearance. Ex parte Arden. In re Arden - 121

35. —— *Execution Creditors—Writs of Fi. Fa. for more and for less than* 20*l.*—*Sale—Notice to Sheriff of Bankruptcy Petition—Title of Trustee—Bankruptcy Act*, 1883, *ss.* 45, 46.] Where the sheriff sells under an execution for more than 20*l.*, and within fourteen days afterwards receives notice of a bankruptcy petition, the effect of s. 46, sub-s. 2, of the Bankruptcy Act, 1883, is not to render the sale absolutely void, but to deprive the execution creditor of the fruits of the sale, and to transfer them to the trustee in the bankruptcy for the benefit of the general body of the creditors.—Where, therefore, a sheriff is in possession under several writs, some for more and some for less than 20*l.*, and proceeds to sell, the writs are payable in order of priority so long as there are funds to pay; but, if he receives notice of a bankruptcy petition within fourteen days after the sale, only those writs are entitled to be paid which are for less than 20*l.*, and which would have been paid had not bankruptcy supervened. In re Pearce. Ex parte Crossthwaite [966

—— Bill of sale—Statement of consideration—Power to seize goods - - 43
See Bill of Sale.

BASTARDY—*Witness—Voluntary Attendance—Refusal to give Evidence—Power of Justices to commit*—7 & 8 *Vict. c.* 101, *s.* 70—*Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict. c.* 65), *s.* 4.] By 7 & 8 Vict. c. 101, s. 70, justices may, at the request of any party to bastardy proceedings before them, summon any person to appear and give evidence upon the matter of such proceedings, and if the person summoned neglect or refuse to appear the justice by warrant may require such person to be brought before him or any justices before whom such proceedings are to be had, "and if any person coming or brought before any such justice in any such proceedings refuse to give evidence thereon," the justices may commit such person to the house of correction:—*Held* (by Grove and Hawkins, JJ., Smith, J., dissenting), that the power to commit extended to any witness, and was not confined to witnesses who appeared in answer to a summons or warrant. The Queen *v.* Flavell - - - 364

BETTING—Placed used for betting—Inclosed field - - - - - 588
See Gaming.

BILL OF EXCHANGE—Specific appropriation of remittances—Insolvency of drawer and acceptor - - - - 611
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BILL OF SALE—*Banker and Customer—Pledge of Goods bought on Credit—Delivery Order—Memorandum in Bank Ledger—Bill of Sale—Possession—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 3, 4—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.] Whatever documents are included in the expression "bill of sale" as defined

BILL OF SALE—*continued.*

by the Bills of Sale Acts, they must still, by force of s. 3 of the Bills of Sale Act, 1878, be limited to documents "whereby the holder or grantee has power to seize or take possession of any personal chattels comprised in or made subject to such" document. The Acts therefore do not include letters of hypothecation accompanying a deposit of goods or pawn tickets given by a pawnbroker, or in fact any case where the object and effect of the transaction are immediately to transfer the possession of the chattels from the grantor to the grantee.—A trader, whose banking account was largely overdrawn, and who required a further advance of 500*l.*, deposited with his bank the invoice of goods bought by him on credit and consigned to him by rail, and gave the bank a delivery order directed to the railway company requiring the company to hold the goods to the order of the bank. The invoice shewed that the goods were bought on credit. On arrival of the goods the company sent the usual advice note to the bank stating that they held the goods to the order of the bank. The 500*l.* was then advanced, and a minute of the transaction, stating the rate of interest on the advance, the terms on which the goods were to be redeemed, &c., was entered in the bank ledger, and was signed by the trader and stamped. Eleven months afterwards the trader became bankrupt:—*Held*, that as the effect of the transaction was immediately to transfer the possession of the goods to the bank, the delivery order and minute did not require registration as a bill of sale, and that the title of the bank was good as against the trustee in bankruptcy.—*Semble*, a pledge by a trader of stock-in-trade which he has bought on credit, and not paid for, is not a "transfer in the ordinary course of business of his trade or calling," within the exception contained in s. 4 of the Bills of Sale Act, 1878. IN RE HALL. EX PARTE CLOSE - - 386

2. —— *Statement of Consideration — Power to seize—Bills of Sale Act*, 1878 (41 & 42 *Vict.* c. 31), *s.* 8—*Bills of Sale Act*, 1882 (45 & 46 *Vict.* c. 43), *ss*, 7, 9.] On the 12th of February a bill of sale was executed to secure an actual advance in cash of 1500*l.* After its execution it was discovered that it contained some clauses which made it void under the Bills of Sale Acts. It was thereupon cancelled, and a new bill of sale was, on the 16th of February, executed in substitution for the first, and was registered on the 18th of February. The second deed contained nothing to shew that it was given in place of a prior bill of sale, but it purported to be given "in consideration of 1500*l.* *now paid*" by the grantee to the grantor:—*Held*, that the consideration was truly stated, and that it was not necessary to state the whole history of the transaction. —The deed empowered the grantee to seize the property in case (inter alia) the grantor "shall do or suffer any matter or thing whereby he shall become a bankrupt":—*Held*, that this event was in substance equivalent to the event "if the grantor shall become a bankrupt" in which, by s. 7 of the Bills of Sale Act, 1882, a grantee is permitted to seize under a bill of sale, and that consequently the bill of sale was not void under s. 9. EX PARTE ALLAM. IN RE MUNDAY - 43

BILL OF SALE—*continued.*

—— Registration—Transfer of registered bill of sale—Equitable sub-mortgage - 636
See BANKRUPTCY. 32.

BOROUGH VOTE—Qualification in list—Mistake —Correction - - - 504
See PARLIAMENT. 3.

BREAD—Sale of—Delivery by cart without beam and scales - - - - 110
See BAKER.

CARRIER—*Railway Company—Passenger's Luggage — Delivery to Passenger — Termination of Company's Risk.*] The plaintiff arrived at a station on the defendants' railway with her luggage contained in two boxes which were taken from the luggage-van by a porter in the employ of the company. The porter asked the plaintiff if he should engage a cab for her. In reply she said she would walk to her destination, and would leave her luggage at the station for a short time, and send for it. The porter said: "All right; I'll put them on one side and take care of them;" Thereupon the plaintiff quitted the station leaving her boxes in the custody of the porter. One of them was lost:—*Held*, that the transaction amounted to a delivery of the luggage by the company to the plaintiff, and a re-delivery of it by her to the porter as her agent to take care of, and that consequently the company were not responsible for the loss.—*Patscheider* v. *Great Western Ry. Co.* (3 Ex. D. 153) distinguished. HODKINSON *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY - - - - 228

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—— *Chinery, Ex parte* (12 Q. B. D. 342), explained
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—— *Gartside* v. *Outram* (26 L. J. (Ch.) 113) approved - - - - 153
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—— *Winter* v. *Bartholomew* (11 Ex. 704) approved - - - - 873
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COMPANY—*Unregistered Loan Society of less than twenty Members—Borrowing Member—Subsequent Increase of Members—Registration—Acquiescence—Bankruptcy of Borrowing Member—Proof for Loan—Companies Act*, 1862 (*25 & 26 Vict. c.* 89), *s.* 4.] An unregistered money club, which in its inception comprises less than twenty members, becomes an illegal association within s. 4 of the Companies Act, 1862, so soon as it comprises upwards of twenty members. Such a society is none

COMPANY—*continued.*

the less within the mischief of the Act because its business is carried on and managed by a committee of seven members as the agents of the society, although they may have full powers as to management and may make by-laws.—*Crowther* v. *Thorley* (32 W. R. 350) distinguished.—In 1881 seven persons formed a loan society, and when business was commenced their members had increased to twenty. In June, 1883, the society was registered under the Companies Act, 1862, with the knowledge and consent of all the members. In 1881 the society advanced 100*l.* to a borrowing member, repayable by monthly instalments, and he duly paid the instalments as they fell due until December, 1883, when he became bankrupt:—*Held*, that under the circumstances the inference was, that all the members had, either expressly or by acquiescence, mutually agreed that all the transactions of the society previous to its registration should continue to be binding on the registered society; and, consequently, that the registered society could prove for the balance of the loan. In re Thomas. Ex parte Poppleton [379

2. —— *Shares—Transfer—Transfer of Shares by Deed—Transfer in Blank—Delivery of Transfer by Transferor as his Deed—Equitable Mortgage of Shares—Notice—Priority—Maxim, "Qui prior est tempore, potior est jure"—Companies Act,* 1862 (25 & 26 *Vict. c.* 89), *s.* 30—*Mode of giving Notice to Company—Notice to Secretary as an Individual.*] Where the shares of a company registered under the Companies Act, 1862, are pursuant to the articles of association thereof to be transferred by deed, a transfer at the time when the transferor parts with the possession and control thereof, must contain the name of the transferee and must identify the shares; and a transfer in blank, that is, a transfer, which at the time above mentioned neither contains the name of the transferee nor identifies the shares, is void, even although the name of the transferee and the number and the numbers of the shares afterwards, but not in the presence nor by the direction of the transferor, are filled in, and he then adopts and acknowledges the transfer; for the mere adoption and acknowledgment by the transferor of the transfer after it has been filled in, it not being either in his possession or under his control at the time of the adoption and acknowledgment, do not amount to a delivery of the transfer by him as his deed.—*Hudson* v. *Revett* (5 Bing. 368) distinguished.—The principle established in *Dearle* v. *Hall* (3 Russ. 1), as to the effect of notice in determining the priorities of equitable rights, does not extend to the shares of companies registered under the Companies Act, 1862, or to companies governed by regulations having a provision similar to s. 30 of that Act.—The Companies Act, 1862, s. 30, forbids the entry of any trust on the register of companies, and where the shares of a company either registered under that statute, or containing a regulation to the like effect with s. 30 thereof, are equitably assigned or mortgaged more than once, the priority of the assignees or mortgagees will be determined by the priority of the assignments or mortgages, and not by the priority of the notices thereof given to the company:—So *held* by Brett, M.R., on the ground that a notice of an equitable assignment

COMPANY—*continued.*

or mortgage, in order to be effectual, must turn the person to whom it is addressed into a trustee, and the Companies Act, 1862, s. 30, and any regulation of a company of a like nature, not only forbid the entry of any trust on the register, but also exempt the company from any liability for acting in contravention of a notice of the equitable assignment or mortgage:—By Cotton, L.J., on the ground that although the directors may be personally liable for permitting a transfer to be registered in contravention of equitable rights of which they have actual notice, nevertheless the company itself is not bound to recognise trusts, and cannot be made liable for accepting a transfer by any notice not to allow it:—By Lindley, L.J., on the ground that although the directors may be personally liable if they allow a transfer to be registered which they know to be fraudulent, nevertheless the only right of an equitable assignee or mortgagee against the company is to apply to the High Court under 5 Vict. c. 5, s. 4, and Rules of the Supreme Court, 1883, Order XLVI., for an order restraining the company from allowing a transfer to be made in contravention of his rights, and the company itself is not bound to take notice of equitable interests in shares not followed up in a reasonable time by proceedings to restrain a transfer.—*Semble*, by Brett, M.R., that the directors and secretary of the company will not be personally liable for disregarding a notice of a trust as to shares and for allowing them to be transferred in contravention thereof.—*Martin* v. *Sedgwick* (9 Beav. 333) dissented from.—*Ex parte Littledale, In re Pearse* (6 De G. M. & G. 714); *Ex parte Stewart, In re Shelley* (4 De G. J. & S. 543); *Ex parte Boulton, In re Sketchley* (1 De G. & J. 163); *Ex parte Union Bank of Manchester, In re Jackson* (Law Rep. 12 Eq. 354); and *Ex parte Agra Bank, In re Worcester* (Law Rep. 3 Ch. 555) discussed.—In order that a notice to a company may be effectual, either it must be given to the company itself through its proper officers, or it must be received by the company in the course of the transaction of its business: casual knowledge, acquired by the secretary as an individual and not whilst he is engaged in transacting the business of the company, cannot be deemed notice to the company.—In March, 1881, M. deposited with S. the certificates and a blank transfer of 100 shares in a company as security for money advanced. In February, 1882, S. died, and the secretary of the company, who was a relative of S., attended his funeral, and during a discussion of the deceased's affairs became acquainted with the existence of the charge on the shares. In December, 1882, M. was heavily in debt to the plaintiffs, and as they pressed him for payment, he fraudulently delivered to them another blank transfer of the same shares. Some days afterwards, the transfer to the plaintiffs was in the absence of M. filled up with the name of the plaintiff C. as transferee and with the numbers of the shares. The company refused to register the transfer to the plaintiffs on the ground that the certificates were not produced, and thereupon M. offered to indemnify the company against any other claim, but shortly after the executors of S. gave notice to the company of the existence of the charge in favour of their testator. The company was registered under the Companies Act, 1862,

COMPANY—*continued.*

and one of the articles of association provided that the shares should be transferred by deed, and another provided that the company should not be bound by or recognise any equitable interest. In an action by the plaintiffs against the executors of S. to obtain a declaration of their title to the 100 shares:—*Held*, first, that the knowledge acquired by the secretary of the company at the funeral of S. of the existence of the charge in his favour could not be deemed notice of its existence to the company itself:—*Held*, secondly, that the offer of M. to indemnify the company could not be deemed to be a delivery of the transfer as his deed, after it had been filled in with the name of C. as transferee and with the numbers of the 100 shares, and that the shares had not been legally transfered to the plaintiffs who had only an equitable mortgage:—*Held*, thirdly, that the notice by the plaintiffs to the company of the charge existing in their favour was notice of a trust, and therefore was invalid, and that the charge in favour of S. being prior in point of time, his executors had the better title in equity to the shares. SOCIÉTÉ GÉNÉRALE DE PARIS *v.* TRAMWAYS UNION COMPANY - - - - - **C. A. 424**

—— Contract between company and local board—Officer of board shareholder in company—Interest - - - - **739**
See LOCAL GOVERNMENT ACTS. 4.

—— Neglect to register transfer of shares—Damages - - - - **882**
See DAMAGES.

COMPENSATION—Lands Clauses Acts—House "injuriously affected" - - **747**
See LANDS CLAUSES ACTS. 2.

—— Lands Clauses Acts—Part of building estate taken for sewage farm - - **753**
See LANDS CLAUSES ACTS.

CONSTABLE—*Notice of Action—Trial in County, where Fact committed*—1 & 2 *Wm.* 4, *c.* 41, *ss.* 5, 19—2 & 3 *Vict. c.* 93, *s.* 8—*Contagious Diseases (Animals) Act*, 1878 (41 & 42 *Vict. c.* 74), *s.* 50.] An officer of police, appointed under 2 & 3 Vict. c. 93, s. 8, who is sued for anything done in intended pursuance of the duties imposed and powers conferred upon him by the Contagious Diseases (Animals) Act, 1878, s. 50, is not entitled by virtue of 1 & 2 Wm. 4, c. 41, ss. 5, 19, to notice of action and to have the action tried in the county where the alleged grievance has been committed; for, although 2 & 3 Vict. c. 93, s. 8, incorporates 1 & 2 Wm. 4, c. 41, nevertheless the protection afforded by s. 19 of the last-named statute extends by force of s. 5 only to those cases, where a constable appointed under it is intending to act with the power and authority given to a constable by the common law or by some statute existing when 1 & 2 Wm. 4, c. 41, was passed. BRYSON *v.* RUSSELL - - - - - - **C. A. 720**

CONTRACT—Corporation—Appointment of officer not under seal - - - **500**
See CORPORATION.

CORPORATION—*Contract with—Not under Seal—School Board—Appointment of Architect—Orders to—Minutes of Board duly signed—Validity—*33 & 34 *Vict. c.* 75, *s.* 30, *sub-ss.* 1, 4, 6—*Sect.* 35—*Third Schedule*, 7.] By 33 & 34 Vict. c. 75 (the Elementary Education Act, 1870), s. 30, sub-s. (1), "a school board shall be a body corporate . . . . having a perpetual succession and a common seal . . ." sub-s. (4) any minute made of proceedings at meetings of the school board, if signed by . . . . the chairman . . . . shall be receivable in evidence in all legal proceedings without further proof . . . . sub-s. (6) the rules contained in the third schedule shall be observed.—By s. 35 a school board may appoint a clerk and a treasurer and other necessary officers . . . .—By the Third Schedule, 7, the appointment of any officer of the board may be made by a minute of the board, signed by the chairman of the board, and countersigned by the clerk (if any) of the board, and any appointment so made shall be as valid as if it were made under the seal of the board.—By a minute signed by the chairman of a school board and countersigned by the clerk, the plaintiff was appointed architect of the board, and under orders given by subsequent minutes so signed and countersigned and communicated to him, he prepared plans for the board:—*Held*, that by virtue of the provisions of the Act he was entitled to recover payment for his services although the appointment and orders were not under seal. SCOTT *v.* CLIFTON SCHOOL BOARD [**500**

—— Contract not under seal - - **87**
See LOCAL GOVERNMENT ACTS.

—— Contract not under seal—Urban authority
See LOCAL GOVERNMENT ACTS. 6. [**911**

—— Municipal corporation—Resignation of office—Power to withdraw resignation **908**
See MUNICIPAL CORPORATION.

COSTS—Action in formâ pauperis - - **859**
See PRACTICE. 3.

—— Arbitration—"Event" - - **841**
See PRACTICE. 6.

—— Claim for debt and counter-claim for debt—Reference—Costs to abide "event" **821**
See PRACTICE. 7.

—— Bankruptcy—Creditors served with notice of appeal—Appearance - - **936**
See BANKRUPTCY. 10.

—— Bankruptcy—Notice of preliminary objection - - - - - - **123**
See BANKRUPTCY. 2.

—— Official receiver — Bankruptcy — Personal liability—Unsuccessful appeal - **48**
See BANKRUPTCY.

—— Bankruptcy—Order for costs as between solicitor and client—Time for making order - - - - - - **298**
See BANKRUPTCY. 7.

—— Bankruptcy—Trustee served with notice of appeal - - - - **121**
See BANKRUPTCY. 34.

—— Breach of promise—Verdict for 20*l.* - **53**
See PRACTICE. 4.

—— Action remitted for trial to county court—Order LXV., rr. 1, 4 - - **6**
See PRACTICE. 5.

—— Action which could not be brought in county court—Judgment for sums not exceeding 50*l.* - - - - - **53**
See PRACTICE. 4.

COSTS—*continued.*

—— Hearing fee—Rule for justice to hear summons - - - - - 82
See PRACTICE. 8.

—— Security for - - - - 539
See PRACTICE. 9.

COUNTY COURT—Action remitted for trial—Costs—Order LXV., rr. 1, 4 - 6
See PRACTICE. 5.

—— Action remitted—New trial - - 55
See PRACTICE. 14.

—— Costs—Breach of promise—Verdict in Divisional Court for 20*l.* - - 53
See PRACTICE. 4.

—— Employers' Liability Act, 1880—Action of tort—Stay of proceedings 818, 905
See EMPLOYER AND WORKMAN.

COVENANT—Separation deed—Molestation—Condition precedent—Adultery by wife
See HUSBAND AND WIFE. 4. [792

CRIMINAL LAW—*Criminal Information for Libel—Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 3—Information filed without Fiat of Director of Public Prosecutions.*] The 3rd section of the Newspaper Libel and Registration Act, 1881, which enacts that no criminal prosecution shall be commenced against any proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England, or her Majesty's Attorney General in Ireland, being first had and obtained, does not apply to a criminal information for libel filed by order of the Court. YATES *v.* THE QUEEN [C. A. 648

2. —— *Indecent Exposure of Person—Public Place—Nuisance—Public Nuisance—Exposure—14 & 15 Vict. c. 100, s. 29.*] The prisoner was convicted of indecently exposing his person to divers subjects of the Queen in a certain public place, upon evidence shewing that the place in question was out of sight of the public footpath, but was a place to which the prisoner had gone with several little girls, though without any legal right to go there, and was a place to which persons were in the habit of going without having any strict legal right so to do, and that persons so going were never in any way hindered or interfered with:—*Held*, by the Court (Lord Coleridge, C.J., Grove, J., Huddleston, B., Manisty, and Mathew, JJ.), that the conviction was correct, and that the jury were justified in finding that the place was public.—*Semble*, that the offence may be indictable if committed before divers subjects of the realm, even if the place be not public. THE QUEEN *v.* WELLARD C. C. R. 63

3. —— *Murder—Killing and eating Flesh of Human Being under Pressure of Hunger—"Necessity"—Special Verdict—Certiorari—Offence on High Seas—Jurisdiction of High Court.*] A man who, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder; although at the time of the act he is in such circumstances that he believes and has reasonable ground for believing that it affords the only chance of preserving his life. At the trial of an indictment for murder it appeared, upon a special verdict, that the prisoners D. and S., seamen, and the deceased, a boy between seventeen and eighteen, were cast away in a storm on the high seas, and compelled to put into an open boat: that the boat was drifting on the ocean, and was probably more than 1000 miles from land; that on the eighteenth day, when they had been seven days without food and five without water, D. proposed to S. that lots should be cast who should be put to death to save the rest, and that they afterwards thought it would be better to kill the boy that their lives should be saved; that on the twentieth day D., with the assent of S., killed the boy, and both D. and S. fed on his flesh for four days; that at the time of the act there was no sail in sight nor any reasonable prospect of relief; that under these circumstances there appeared to the prisoners every probability that unless they then or very soon fed upon the boy, or one of themselves, they would die of starvation:—*Held*, that upon these facts, there was no proof of any such necessity as could justify the prisoners in killing the boy, and that they were guilty of murder. THE QUEEN *v.* DUDLEY AND STEPHENS [273

4. —— *Vagrant Act (5 Geo. 4, c. 83), s. 4—"Frequenting" a Public Thoroughfare with Intent to commit a Felony.*] A man who *frequents* a public street, having in his mind the intent to commit a felony when and wheresoever opportunity arises, is liable to the penalties of the Vagrant Act, 5 Geo. 4, c. 83, s. 4, even though no opportunity should arise, and may be committed as a rogue and vagabond, if the justices are satisfied on sufficient evidence, first, that he frequented the street, and secondly, that he did so with intent to commit a felony. The overt act, or the attempt to carry out the intent, is not an essential part of the offence against the Act.—The appellant was found and apprehended by two constables at about two o'clock in the morning in a public thoroughfare called Victoria Road, having in his possession a portion of a brass pump which appeared to have been wrenched off from the continuation-pipe. Being stopped and questioned as to how he became possessed of it and whither he was taking it, he gave an account which proved to be false, and also a false name and address. Being charged before two justices on suspicion of having stolen the pump, and the proof failing, he was then charged under 5 Geo. 4, c. 83, s. 4, with frequenting the street in question with intent to commit a felony; and on proof that he was an associate of thieves, and had four years before been convicted and sentenced to imprisonment for felony,—although there was no proof that he had ever before been seen in the street in question, or that the pump had been stolen, he was convicted as a rogue and vagabond under the 4th section of the Vagrant Act, for "frequenting the public thoroughfare with intent to commit a felony," and sentenced to be imprisoned:—*Held*, that the evidence did not warrant the conviction, inasmuch as it did not shew a frequenting of Victoria Road with intent to commit a felony. CLARK *v.* THE QUEEN 92

—— Solicitor and client—Privileged communication - - - - 153
See EVIDENCE.

DAMAGES—*Company—Neglect to register Transfer of Shares—Companies Act,* 1867 (30 *&* 31 *Vict. c.* 131), *s.* 26.] The plaintiff transferred shares of his in a registered company to A. B. on an agreement between them that if A. B. was accepted as shareholder by the company the shares should be taken by him at their market value in reduction of a debt due to him from the plaintiff. The consideration was stated in the transfer to be only the sum of 5*s.*, and the transfer was brought to the company for registration without any notice of the said agreement between the plaintiff and A. B. The company refused to register, on the ground that the plaintiff was indebted to them, but on its being established after an interval of eighteen months that the plaintiff was not so indebted, the company registered the transfer. In an action against the company for wrongfully refusing to register, the plaintiff sought to recover as damages the loss in market value of the shares between the time when the transfer was brought to the company to be registered and the time when it was in fact registered:—*Held*, that the plaintiff was entitled to recover only nominal damages, as the contract between the plaintiff and A. B. was a special one, of which the company had had no notice, and the ordinary contract on the sale of registered shares was only that the seller should give to the purchaser a valid transfer and do all required to enable the purchaser to be registered as member in respect of such shares, the duty of the purchaser, which has not been altered by s. 26 of the Companies Act, 1867, being to get himself registered as such member. Skinner *v.* City of London Marine Insurance Corporation **C.A. 882**

DEMURRAGE—Charterparty—Lay days - **516**
See Ship. 2.

DISCHARGE — Bankrupt—Condition—Contracting debt without reasonable or probable ground of ability to pay - - **600**
See Bankruptcy. 9.

DISQUALIFICATION—Commissioners of Sewers —Interest - - - - **561**
See Sea-wall.

DUCHY OF LANCASTER, ATTORNEY GENERAL OF—*English Information, Right to exhibit.*] It is not competent to the Attorney General of the Duchy of Lancaster to exhibit an information in the High Court of Justice, and the Court will order an information exhibited by him to be taken off the file on the application of the defendant even after answer put in by the defendant. Attorney General of Duchy of Lancaster *v.* Duke of Devonshire - - - **195**

EJECTMENT — Relief against forfeiture — Nonpayment of rent—Disallowance of costs to plaintiff - - - - **347**
See Practice. 10.

ELECTION—Town councillor—Petition against some only of persons returned—Ground affecting validity of election as a whole
See Municipal Election 2. [73

EMPLOYER AND WORKMAN—*Actions of Tort —Stay of Proceedings—County Courts Act,* 1856 (19 *&* 20 *Vict. c.* 108), *s.* 39—*Employers' Liability Act,* 1880 (43 *&* 44 *Vict. c.* 42), *s.* 6.] Sect. 39 of the County Courts Act, 1856, entitles the defendant "in any action of tort," where the claim exceeds 5*l.*, to a stay of proceedings upon certain conditions as to giving security for the amount claimed, and the costs of trial in one of the superior courts of common law:—*Held*, that this section was intended to apply only to actions which could be brought either in one of the superior courts or in a county court, and therefore did not apply to an action under the Employers' Liability Act, 1880, which by s. 6 of that Act must be brought in a county court. The Queen *v.* Judge of the City of London Court - - - **818**

2. —— *Employers' Liability Act,* 1880 (43 *&* 44 *Vict. c.* 42), *s.* 6—*County Court—Action of Tort—Stay of Proceedings* (19 *&* 20 *Vict. c.* 108), *s.* 39.] Sect. 39 of the County Courts Act, 1856, entitles the defendant "in any action of tort" where the claim exceeds 5*l.* to a stay of proceedings, upon certain conditions as to giving security for the amount claimed and the costs of trial in one of the superior courts of common law:—*Held*, affirming the decision of the Queen's Bench Division, that this section was intended to apply only to actions which could be brought either in one of the superior courts or in a county court, and therefore did not apply to an action under the Employers' Liability Act, 1880, which by s. 6 of that Act must be brought in a county court. The Queen *v.* Judge of City of London Court
[**C. A. 905**

—— Injury to workman from having conformed to orders of fellow workman - **68**
See Master and Servant.

EVIDENCE—*Solicitor and Client, Communications between—Privileged Communication—Communication in furtherance of Criminal Purpose—Criminal Law.*] All communications between a solicitor and his client are not privileged from disclosure, but only those passing between them in professional confidence and in the legitimate course of professional employment of the solicitor. Communications made to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure.—C. and R. were partners under a deed of partnership. M. brought an action against R. & Co., and obtained judgment therein, and issued execution against the goods of R. The goods seized in execution were then claimed by C. as his absolute property under a bill of sale executed in his favour by R. at a date subsequent to the above-mentioned judgment. An interpleader issue was ordered to determine the validity of the bill of sale, and upon the trial of this issue, the partnership deed was produced on C.'s behalf, bearing an indorsement purporting to be a memorandum of dissolution of the said partnership, prior to the commencement of the action by M. Subsequently C. and R. were tried and convicted upon a charge of conspiring to defraud M., and upon that trial the case for the prosecution was, that the bill of sale was fraudulent, that the partnership between R. and C. was in truth subsisting when it was given, and that the memorandum of dissolution indorsed on the deed was put there after M. had obtained judgment, and fraudulently ante-dated,

EVIDENCE—*continued.*
the whole transaction being, it was alleged, a fraud intended to cheat M. of the fruits of his execution. Upon the trial a solicitor was called on behalf of the prosecution to prove that after M. had obtained the judgment C. and R. together consulted him as to how they could defeat M.'s judgment, and as to whether a bill of sale could legally be executed by R. in favour of C. so as to defeat such judgment, and that no suggestion was then made of any dissolution of partnership having taken place. The reception of this evidence being objected to, on the ground that the communication was one between solicitor and client, and privileged, the evidence was received, but the question of whether it was properly received was reserved for this Court:—*Held*, by the Court (Grove, J., Pollock and Huddleston, BB., Hawkins, Lopes, Stephen, Watkin Williams, Mathew, Day, and Smith, JJ.), that the evidence was properly received.—*Cromack* v. *Heathcote* (2 B. & B. 4); *Rex* v. *Smith* (1 Phil. & Arn. on Evidence, 118); and *Doe* v. *Harris* (5 C. & P. 592) overruled.—*Follett* v. *Jefferyes* (1 Sim. (N.S.) 1); *Russell* v. *Jackson* (9 Hare, 387); and *Gartside* v. *Outram* (26 L. J. (Ch.) 113) approved. THE QUEEN *v.* COX AND RAILTON **C. C. R. 153**

—— Admission of deceased person against interest—Bankruptcy - - 415
See BANKRUPTCY. 25.

—— Judgment—Proof—Bankruptcy - 606
See BANKRUPTCY. 26.

—— Witness—Voluntary attendance—Refusal to give evidence - - - 364
See BASTARDY.

FOREIGN LAW—Settlement executed in foreign country—Bankruptcy—Reputed ownership - - - - - - 417
See BANKRUPTCY. 31.

FORFEITURE—Relief—Ejectment for non-payment of rent—Disallowance of costs to plaintiff - - - - 347
See PRACTICE. 10.

FRAUDS, STATUTE OF—Husband and wife—Agreement for settlement—Part performance—Bankruptcy - - 419
See BANKRUPTCY. 12.

GAME—*Prevention of Poaching—Search by Constable in Highway—Seizure—25 & 26 Vict. c.* 114, *s.* 2.] A police constable saw the appellant in a highway with some rabbits slung over his back. The appellant left the highway and ran across a meadow followed by the police constable, and on being overtaken, at a distance from the highway, he threw the rabbits on the ground, and they were then and there taken possession of by the police constable. On appeal against a conviction under 25 & 26 Vict. c. 114, s. 2:—*Held*, that the conviction was right—*Turner* v. *Morgan* (Law Rep. 10 C. P. 587) commented on. LLOYD *v.* LLOYD - - - - - - - 725

GAMING—*Betting—Place used for Betting, What is—16 & 17 Vict. c.* 119, *ss.* 1, 3.] Dog-races were held in an inclosed field hired for the purpose by a committee, the public being admitted to a reserved portion of the field on payment of a small sum. The appellant attended the races, and moved about the reserved portion, making bets with various persons there:—*Held*, that the appellant did not use a place for the purpose of betting with persons resorting thereto, within the meaning of ss. 1 and 3 of 16 & 17 Vict. c. 119, and therefore was not liable to be convicted for an offence under those sections. SNOW *v.* HILL 588

GUARDIAN—Disqualification — Clerk of highway or school board - - 325
See POOR-RATE. 4.

HUSBAND AND WIFE—*Action by Husband against Wife—Separate Estate—Money paid by Husband for Wife before and after Marriage—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1, *sub-ss.* 2, 3, 4; *ss.* 3, 12, 13.] A husband is entitled to maintain an action against his wife, and to charge her separate property for money lent by him to her after their marriage, and for money paid by him for her after their marriage at her request made before or after their marriage, but he is not entitled, even since the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), to maintain any action against her for money lent to her or money paid for her before their marriage at her request. BUTLER *v.* BUTLER - - - - - 831

2. —— *Married Women's Property Acts,* 1870 *and* 1882 (33 *&* 34 *Vict. c.* 93, *and* 45 *&* 46 *Vict. c.* 75)—*House in sole occupation of Wife as her Separate Property—Trespass for entering—Right of Wife to sue.*] A married woman in the sole occupation of a house, bought by her out of her own earnings, since the Married Women's Property Act, 1870, can now, after the Married Women's Property Act, 1882, sue alone, without her husband, in an action for trespass, a person who has entered such house against her will, though he did no injury to the house and entered it with the authority of her husband, but for a purpose unconnected with the husband's desire to live with his wife.—*Query*, if the husband has himself a right to enter such house. WELDON *v.* DE BATHE - - - - **C. A. 339**

3. —— *Judgment Summons—Order for Payment—Separate Estate—Restraint on Anticipation—Debtors Act,* 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5.] Upon a judgment summons issued under s. 5 of the Debtors Act, 1869, against a married woman who has only separate estate which she is restrained from anticipating, an order for payment cannot be made unless it is shewn that, since the date of the judgment, she has received some of her separate income.—If in the judgment execution is limited to separate estate which she is not restrained from anticipating, *quære*, whether s. 5 of the Debtors Act, 1869, applies at all.—*Dillon* v. *Cunningham* (Law Rep. 8 Ex. 23) distinguished. MEAGER *v.* PELLEW - - - **C. A. 973**

4. —— *Separation Deed—Absolute Covenant to pay Annuity—Adultery by Wife—Condition Precedent — Independent Covenants — Covenant against Molestation—Molestation, what amounts to.*] In a separation deed a covenant, by which the husband undertakes to pay his wife an annuity without restricting his liability to such

HUSBAND AND WIFE—*continued.*
time as she shall be chaste, is good and is not against public policy, and the covenant remains in force and the annuity continues payable, although the wife afterwards commits adultery.—But, *semble*, per Cotton, L.J., on the authority of *Evans* v. *Carrington* (2 De G. F. & J. 481), that if the covenant had been inserted in the separation deed with the intent that the wife might be at liberty to commit adultery, the deed would have been void.—Covenants in a separation deed, by which respectively the husband has covenanted to pay an annuity to a trustee for the wife, and the trustee has covenanted that the wife shall not molest the husband, must be construed as independent covenants in the absence of any express terms making them dependent, and therefore a breach of the covenant, that a wife shall not molest the husband, is not an answer to an action for the annuity.—Neither adultery alone by the wife, nor adultery by her followed by the birth of a spurious child, is a breach of a covenant in a separation deed against molestation by the wife.—But, *semble*, adultery by the wife followed by the birth of a spurious child whom she puts forward as the child of her husband, especially if this is done with intent to claim a title or property to which the legitimate offspring of her husband would be entitled, is evidence of a breach of a covenant against molestation by her.—By Brett, M.R., in order to constitute a breach of a covenant in a separation deed against molestation by a wife, some act must be done by her or by her authority with intent to annoy her husband and which is in fact an annoyance to him, or at least some act must be done by her or by her authority with a knowledge that it must of itself without more annoy her husband or annoy a husband with reasonable and proper feeling. FEARON *v.* EARL OF AYLESFORD - - - C. A. 792

—— Bankruptcy — Ante-nuptial agreement for settlement—Part performance—Statute of Frauds - - - - - 419
See BANKRUPTCY. 12.

—— Bankruptcy—Wife's separate property in possession of husband—Reputed ownership - - - - - 417
See BANKRUPTCY. 31.

ILLEGALITY — Contract — Urban authority — Officer concerned in contract - 911
See LOCAL GOVERNMENT ACTS. 6.

—— Loan society of less than twenty members—Subsequent increase of members—Registration - - - - - 379
See COMPANY.

—— Payment of bankrupt's money to procure withdrawal of criminal prosecution—Relation back of trustee's title - 32
See BANKRUPTCY. 30.

INCOME TAX—Coal mines—Dead rent—Deductions from gross profits - - 491
See REVENUE.

—— Life insurance company—Bonus to participating policy-holders - - 239
See REVENUE. 3.

INDECENCY—Exposure of person—Public place
See CRIMINAL LAW. 2. . . . [63

INDEMNITY—*Goods lawfully seized for another's Debt.*] As a general rule, where one person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt the owner is entitled to recover the value of them from the debtor; and the right to indemnity exists although there may be no agreement to indemnify, and although there may be in that sense no privity between the owner of the goods and the debtor.—*England* v. *Marsden* (Law Rep. 1 C. P. 529) questioned.—The defendant bought the business of an ironmonger in his own name for his two sons; he paid the greater part of the purchase-money. The banking account of the business was kept by him, and he drew the cheques on that account. A society having obtained judgment in an action against the defendant, certain goods of his sons were seized by the sheriff: the sons claimed the goods: but upon an interpleader summons taken out by the sheriff, the claim of the sons was barred, and the goods were sold. They realised 1300*l.*, and this sum was paid into Court in the action by the society against the defendant as a security for what might be found due to the society from the defendant upon taking certain accounts. The defendant's sons were afterwards adjudicated bankrupts, and the plaintiff was appointed their trustee. The defendant agreed with the plaintiff that in consideration of his sons' goods having been seized and sold on behalf of the society in respect of an alleged claim against him, he would pay 300*l.* per annum to the plaintiff until he should have paid a sufficient sum to pay the trade creditors of his sons in full. The plaintiff having brought the present action to recover 1200*l.* due by virtue of the above-mentioned agreement, or in the alternative 1300*l.*, the value of the goods seized:—*Held*, that even if the defendant's express promise to pay 1200*l.* was not legally binding upon him, nevertheless the action was maintainable; for although the decision upon the interpleader summons did not estop the defendant from shewing that the seizure by the sheriff was unlawful, nevertheless he had by his conduct led to the seizure, and the goods of his sons had been legally taken for his debt; the defendant, therefore, was bound to indemnify his sons, and the plaintiff, as their trustee in bankruptcy, was entitled to have judgment entered for him for the sum of 1200*l.*, which he was willing to accept instead of 1300*l.*, the value of the goods seized. EDMUNDS *v.* WALLINGFORD - - - - - C. A. 811

INFORMATION — Libel — Fiat of Director of Public Prosecutions - - 648
See CRIMINAL LAW.

INN—*Licence—Renewal—General Annual Licensing Meeting—Proceedings where no Notice of Opposition—Objection not made in open Court—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 42.] By s. 42 of the Licensing Act, 1872, justices at the general annual licensing meeting shall not entertain any objection to the renewal of a licence, or take any evidence with respect to the renewal thereof, unless written notice of an intention to

INN—*continued.*
oppose the renewal has been served upon the holder of the licence in the prescribed manner: "Provided that the justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered, as if the notice hereinbefore prescribed had been given:"—*Held*, that an objection to the renewal of a licence made privately to justices before they came into court at the general annual licensing meeting was not a good "objection made" within the meaning of the proviso to s. 42, and that, therefore, the justices had no power to adjourn the case. The Queen *v.* Justices of Merthyr Tydvil - - - - - - 584

INSURANCE (MARINE)—*Memorandum against Average under* 3 *per cent.—Adding distinct successive Losses together—Time Policy.*] In a time policy of marine insurance the ship was warranted free from average under 3 per cent. unless general, or the ship be stranded, sunk, or burnt:—*Held*, following *Blackett* v. *Royal Exchange Assurance Co.* (2 C. & J. 244), that distinct successive losses on the ship during the period insured, each less than 3 per cent., but in the aggregate amounting to more than 3 per cent., were not within the exception and were to be borne by the underwriters. Stewart *v.* Merchants Marine Insurance Company - - - - - - - 555

INTEREST—Of Commissioners of Sewers—Disqualification - - - 561
See Sea Wall.

—— Offices of local board—"Bargain or contract"—Demise of rooms - - 735
See Local Government Acts. 3.

—— Offices of local board—Shareholders in company having contract with local board
See Local Government Acts. 4. [739

INTERPLEADER—Appeal—Judge disposing of whole matter - - - 371
See Practice. 11.

—— Appeal—Trial of issue—Judgment - 377
See Practice. 13.

—— Security for costs—Practice - - 539
See Practice. 9.

—— Sheriff—Protection—Action of trespass 873
See Practice. 12.

JUDGMENT DEBT—Bankruptcy—Inquiry into consideration - - - 415
See Bankruptcy. 25.

JUDGMENT RECOVERED—*Res Judicata—Cause of Action—Separate Actions in respect of same wrongful Act—Damage to Property and Injury to Person—Damages recoverable in previous Action —Maxim, "Nemo debet bis vexari pro unâ et eâdem causâ"—Maxim, "Interest reipublicæ ut sit finis litium."*] Damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for the injury to the person.—So *held* by Brett, M.R., and Bowen, L.J., Lord Coleridge, C.J., dissenting.—The plaintiff brought an action in a county court for damage to his cab occasioned by the negligence of the defendant's servant, and having recovered the amount claimed, afterwards brought an action in the High Court of Justice against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence:—*Held*, by Brett, M.R., and Bowen, L.J., Lord Coleridge, C.J., dissenting, that the action in the High Court was maintainable, and was not barred by the previous proceedings in the county court.—Judgment of the Queen's Bench Division (11 Q. B. D. 712) reversed. Brunsden *v.* Humphrey - **C. A.** 141

JUDGMENT, SIGNING—No proceeding for a year
See Practice. 17. [231

JUDGMENT SUMMONS—Married woman—Separate estate - - - - 973
See Husband and Wife. 3.

—— Order for committal—"Means to pay" 597
See Bankruptcy. 13.

JURISDICTION—Bankruptcy—Petition presented in wrong court—Receiving order
See Bankruptcy. 28. [37

—— Inferior Court—Prohibition - - 855
See Prohibition.

—— Murder on high seas - - - 273
See Criminal Law. 3.

JUSTICE—*Refusal by, to do Act relating to the Duties of his Office—Rule under* 11 & 12 *Vict. c.* 44, *s.* 5—*Mandamus.*] The application of the 5th section of 11 & 12 Vict. c. 44, is not confined to cases where the justice requires protection in respect of the act he is called upon to do.—*Reg.* v. *Percy* (Law Rep. 9 Q. B. 64) not followed. The Queen *v.* Biron - - - - 474

2. —— *Case, Power of Justices to state—Summary Jurisdiction Act* (42 & 43 *Vict. c.* 49), *s.* 33—*Order, Determination, or other Proceeding of a Court of Summary Jurisdiction—General District Rate, Order for Payment of—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *s.* 256—*Functions of Justices in enforcing General District Rate.*] A special case may be stated by justices under the 33rd section of the Summary Jurisdiction Act, 1879, upon an application to enforce payment of a general district rate under the 256th section of the Public Health Act, 1875.—On an application under the last-mentioned section to enforce a general district rate good on the face of it, the justices may not refuse to make an order for payment of the rate on the ground that there is a concurrent rate made for the same purpose. Sandgate Local Board *v.* Pledge - - 730

LANCASTER—Attorney General—Right to exhibit information - - - 195
See Duchy of Lancaster.

LANDLORD AND TENANT—*Power to determine Tenancy by delivering written Notice to Tenant—Tenant's Address unknown—Delivery of Notice at demised Premises.*] A lease of premises for twenty-one years contained a proviso that it should be lawful for the landlord or his assigns to put an

LANDLORD AND TENANT—*continued.*
end to the demise at the end of the first fourteen years by delivering to the tenant or his assigns six calendar months' previous notice in writing of his intention to do so. In an action by the assignee of the reversion to recover possession of the premises, on the ground that the demise had been duly determined by notice under the proviso, it appeared that the lessee had disappeared some years previously, after having mortgaged the premises by way of underlease; that his address could not be found, and that written notice to determine the tenancy directed to him had been sent to his last known address, and had also been delivered to the mortgagee and left upon the demised premises:—*Held*, that the action could not be maintained, for there was nothing in the circumstances to warrant the plaintiff in serving the notice otherwise than by delivering it to the lessee. Hogg *v.* Brooks - - - 475

—— Bankruptcy—Agreement for lease—"Land burdened with onerous covenants" 956
See Bankruptcy. 14.

—— Bankruptcy — Disclaimer of leaseholds — Mortgagee—Form of order - 405
See Bankruptcy. 16.

—— Bankruptcy—Disclaimer—Landlord's claim for compensation—Jurisdiction - 960
See Bankruptcy. 15.

—— Bankruptcy—Disclaimer—Neglect of trustee —Costs - - - - 401
See Bankruptcy. 22.

LANDS CLAUSES ACT, 1845 (8 & 9 *Vict. c.* 18), *s.* 63—*Part of Building Estate taken for Sewage Farm—Value of other Parts thereby depreciated—Compensation for "injuriously affecting" same.*] Part of land laid out as a building estate was taken by a local board under an Act incorporating the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), for the purposes of a sewage farm, whereby the value of other parts of the land near to the part so taken was depreciated, even in the absence of any nuisance arising from the sewage farm when made:—*Held*, that the owner of the estate was entitled to compensation under the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), s. 63, not only in respect of the land taken, but also for damage sustained by reason of the "injuriously affecting" the other lands by the exercise of the statutory powers. The Queen *v.* Essex - - 753

2. —— 8 & 9 *Vict. c.* 18—*House "injuriously affected"—Special Value as a Public-house—Compensation for.*] Under statutory powers conferred by an Act incorporating the Lands Clauses Act, 1845 (8 & 9 Vict. c. 18), a railway company stopped up a street in which were a house and premises used as an hotel, whereby the value thereof for using, selling, or letting as an hotel and public-house was diminished:—*Held*, that the owner was entitled to compensation under the Lands Clauses Act, 1845, for the depreciation in the special value of the premises as an hotel and public-house. Wadham *v.* North Eastern Ry. Co. - - - - - - 747

LIBEL—Criminal information—Fiat of Director of Public Prosecutions - - 648
See Criminal Law.

LICENSING ACTS—Inn—Objection to renewal of licence—Objection made privately 584
See Inn.

LIEN—Solicitor—Charging order - - 543
See Solicitor.

LIGHTHOUSE — Poor-rate — Rateable value — Telegraph station and premises - 770
See Poor-rate. 3.

LIMITATION—Devise upon trust to pay debts —No real estate - - - 394
See Bankruptcy. 20.

LIMITATIONS, STATUTE OF (21 *Jac.* 1, *c.* 16)—*Cause of Action—Recovery of Damages for Injury after Satisfaction for Previous Injury arising from same Act—Support—Action for Subsidence after Compensation for previous Subsidence.*] The plaintiff was the owner of certain land, and in 1867 and 1868, but not afterwards, the defendants worked a seam of coal lying under and near to the plaintiff's land, which subsided in consequence of the defendants' excavations. Some cottages of the plaintiff standing on his land were damaged by the subsidence and were repaired by the defendants. In 1882 a second subsidence of the plaintiff's land occurred owing to the defendants' workings in 1867 and 1868, and the plaintiff's cottages were again damaged:—*Held*, that the plaintiff was entitled to maintain an action for the damage done to his cottages in 1882, and that his right to sue was not barred by the Statute of Limitations.—*Nicklin* v. *Williams* (10 Ex. 259), *Backhouse* v. *Bonomi* (E. B. & E. 622; 9 H. L. C. 503), *Whitehouse* v. *Fellowes* (10 C. B. (N.S.) 765) discussed.—*Lamb* v. *Walker* (3 Q. B. D. 389) overruled. Mitchell *v.* Darley Main Colliery Co. [C. A. 125

LIQUIDATION BY ARRANGEMENT—Release and discharge of trustee—Power of Board of Trade to require account 402
See Bankruptcy. 18.

—— Removal of trustee by Court - - 177
See Bankruptcy. 17.

LOCAL GOVERNMENT ACTS—*Contract by Corporation—Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 150, 174, 257—*Sewering and paving—Liability for Proportion of Expenses—Contract not under Seal.*] In an action by a local authority to recover from the defendant his proportion of the cost of sewering, paving, &c., a street under the powers of the Public Health Act, 1875, s. 150, it appeared that part of the work, to an amount exceeding 50*l.*, had been done by contractors employed by the local authority, but that no written contract under the common seal of the authority had been made with them (as provided by s. 174):—*Held*, by Hawkins, J., and Smith, J., that the defendant was nevertheless liable. By Smith, J., that the objection, if valid, would have been an objection to the apportionment, which could only be raised in the time and manner provided by s. 257. Bournemouth Commissioners *v.* Watts - - - - - - 87

2. —— *Nuisance — Urinal — Public Health Act,* 1875 (38 & 39 *Vict. c.* 55), *ss.* 39, 149, 264, 308 — *Compensation — Mandatory Injunction — Public Highway.*] A local board, assuming to act under the authority of s. 39 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), erected a

LOCAL GOVERNMENT ACTS—*continued.*

public urinal partly upon a highway and partly upon a strip of land belonging to the plaintiff, and so near to other adjoining land of the plaintiff as to be a nuisance to her and her tenants and to depreciate the value of her property:—*Held*, that the plaintiff was entitled to a mandatory injunction to restrain the board from continuing the urinal upon her land or so near thereto as to cause injury or annoyance to her or her tenants:—*Held* also, that it was not a matter in respect of which the plaintiff's remedy was by compensation under s. 308 of the Act.—In such a case notice of action under s. 264 is not required.—Abutting upon the highway the plaintiff had land upon which an inn and some stabling were erected. These stood back from the highway, and in front of them was an open space (forming part of the same land) which had been left open to and on a level with the highway until the defendants in exercise of their powers under s. 149 of the Act, and for the convenience of the public, placed kerb-stones and a raised foot-path at the side of the highway, leaving openings so that carriages could still pass at convenient places to and from the plaintiff's land and premises:—*Held*, that the plaintiff was not entitled to a mandatory injunction directing the defendants to remove the kerb-stones, and that in the absence of any unreasonable conduct the remedy for any injury caused by the kerb-stones would be by compensation under s. 308 of the Act. Sellors *v.* Matlock Bath Local Board - - - 928

3. —— *Officer of Local Board—"Concerned or interested in any bargain or contract" with Board—Demise of Rooms to Local Board—"Allowance" in addition to Salary—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 174, 175, 189, 193, 265.] A demise of rooms is a "bargain or contract" within the meaning of s. 193 of the Public Health Act, 1875, and if an officer, employed by a local board constituted under that statute, lets rooms to the board at a rent payable by it to him, although the rooms are used by it in the transaction of its business, he becomes liable to the penalty imposed by that section; for the rent payable by the local board cannot be considered as an "allowance" to the officer in addition to his salary within the meaning of ss. 189, 193, it being unconnected with the performance of any services in the course of his employment under the board. Burgess *v.* Clark [C. A. 735

4. —— *Officer—Shareholder in Company—Contract between Company and Local Board—"Interested in any bargain or contract" with Local Board—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 193.] An officer of a local board, who is a shareholder in a company having a contract with the board, is, so long as the contract exists, "interested in a bargain or contract" with the board within the meaning of the Public Health Act, 1875, s. 193, and if the contract is capable of producing any profit to the shareholders of the company, he is liable to the penalty imposed by that enactment. Todd *v.* Robinson [C. A. 739

5. —— *Streets—Apportionment of Expenses—Premises "fronting, adjoining, or abutting"—*

LOCAL GOVERNMENT ACTS—*continued.*

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.] The appellant owned premises separated from a street by a wall five feet high, belonging, together with the land on which it stood, to another person. The appellant had no direct access from his premises to the street, but in order to reach it had to pass for a short distance down a public footpath, or over other intervening land:—*Held*, that the appellant was not the owner of premises "fronting, adjoining, or abutting" on the street within the meaning of s. 150 of the Public Health Act, 1875, and therefore was not liable to contribute to the expenses of sewering and paving the street under that section. Lightbound *v.* Bebington Local Board - 849

6. —— *Urban Authority—Contract not under Seal—Affixing Seal where Contract partly performed, Effect of—Illegality—Officer concerned in Contract, whether Contract void—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 174, 193.] By s. 174 of the Public Health Act, 1875, every contract made by an urban authority whereof the value or amount exceeds 50*l.* shall be in writing and sealed with the common seal of such authority.—The defendants, an urban authority, by contract not under seal employed the plaintiffs as engineers to perform certain work. The plaintiffs performed part of the work exceeding in value 50*l.*, and then required the defendants to affix their seal to the contract. This the defendants did, believing that it was for the benefit of the ratepayers of the district that the contract should be completed:—*Held*, that as part of the work was unperformed when the seal was affixed, and there was consideration for affixing it in the plaintiffs' promise to complete the work, it was competent for the defendants to constitute the contract a good contract under seal, within s. 174, in respect of the work already done, and therefore that the plaintiffs were entitled to maintain their action for the value of that work.—By s. 193, officers or servants employed under this Act by the local authority shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act; and if any such officer or servant is so concerned or interested he shall be incapable of afterwards holding or continuing in any office or employment under this Act, and shall forfeit and pay the sum of 50*l.*, to be recovered by any person in the prescribed manner:—*Held*, that this section intended to limit the penal consequences of a breach of its provisions to the specified penalties; and therefore that the enactment did not render a contract made by an officer with the local authority void, so as to disentitle him to sue upon it. Melliss *v.* Shirley Local Board - - - - - - 911

MANDAMUS—*Practice—Pleading to Return to Writ of Mandamus—Return of unconditional Compliance—Rules of Supreme Court*, 1883, *Order LIII., r.* 9; *Order LXVIII., r.* 1; *Order LXXII., r.* 2—9 *Anne, c.* 20 [*Revised Ed. Statutes*, 9 *Anne, c.* 25]—1 *Wm.* 4, *c.* 21—46 & 47 *Vict. c.* 49.] A return of unconditional compliance to a writ of mandamus, which is not a peremptory writ, may be pleaded to, notwithstanding Order LIII., rule 9,

MANDAMUS—*continued.*
since the procedure of pleading to the return to such writ as regulated by the repealed statute 9 Anne, c. 20 [Revised Ed. Statutes, 9 Anne, c. 25], and 1 Wm. 4, c. 21, is preserved by Order LXVIII., rule 1, and Order LXXII., rule 2. The Queen *v.* Justices of Pirehill North - - C. A. 13

—— Refusal by justice to do act relating to the duties of his office - - - - 474
See Justices.

MARKET — *Market not limited by Metes and Bounds—Extension of Market—Streets subject to Market Rights — Street Acts of Parliament not affecting Market — Usage — Presumption of lost Grant.*] By letters patent in 34 Charles II. the King granted to the predecessor in title of those under whom the defendant claimed as lessee the right to hold two markets—one on Thursday and the other on Saturday—in every week, "in or next to Spital Square." The market-place and four inner streets connected therewith were made by the grantee on the square piece of land which had formerly been Spital Square, and which land he had acquired when the charter was granted to him, but he never acquired the adjoining land which surrounded such square piece, and on which, subsequently to the charter, were made certain outer streets, into which the four inner streets ran. By letters patent in 4 James II., made void by 2 Wm. & M. sess. 1, c. 8, a third market was given, viz., on Monday in every week, and a market on Wednesday substituted for that on Thursday.—In proceedings taken at the instance of the local authority to restrain the defendant from licensing the sale of goods in either the outer or the inner streets adjoining the market, the local authority relied on certain Paving Acts of Geo. 3, which empowered such authority to remove the obstruction caused by selling articles in those specific streets, and the defendant proved a usage from the time of living memory to sell vegetables and fruit in any of those streets, and to pay toll to the market-owner for so doing, when by reason of the market being so crowded it was impossible to get nearer to the inside market, and he also proved such usage to hold the market on other days of the week besides on Thursday and Saturday :—*Held*, that the market was a market without metes and bounds, and might extend, therefore, from time to time, as the crowded state of the market might require, over any of these surrounding streets, all of which were to be presumed to have been dedicated to the public subject to the exercise of the market franchise, notwithstanding the Paving Acts, as such Acts were not to be construed as interfering with the market rights :—*Held*, also, that the right to hold the market was confined to the two days mentioned in the charter of Charles II., and that under the particular circumstances of the case a lost grant for the other days of the week was not to be inferred. Attorney-General *v.* Horner - C. A. 245

MARRIED WOMAN—Action by husband against wife—Separate estate - - 831
See Husband and Wife.

—— Judgment summons—Order for payment—Separate estate - - - 973
See Husband and Wife. 3.

MARRIED WOMAN—*continued.*
—— Right to sue husband for trespass—Separate estate - - - - - 339
See Husband and Wife. 2.

MASTER AND SERVANT—*Employer's Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 3—*Injury resulting to Workman from having conformed to Orders or Directions of Fellow Workman.*] The 1st section of the Employers' Liability Act, 1880, provides that, where personal injury is caused to a workman (3) by reason of the negligence of any person in the service of the employer to whose orders or directions the workman at the time of the injury was bound to conform, and did conform, where such injury resulted from his having so conformed, the workman or, in case the injury resulted in death, his legal personal representatives, shall have the same right of compensation against the employer as if the workman had not been a workman of nor in the service of the employer nor engaged in his work.—The plaintiff, a boy employed by the defendants, a railway company, was assisting a carman of the defendants, under whose directions he was, in unloading from a van three large iron window frames. The frames were standing upright in the van, secured at each end to the hooks of the van by a string. The carman untied the string at one end of the frames, and the plaintiff untied the string at the other end. The carman did not expressly order the plaintiff to untie the string but the plaintiff stated that he did so without orders because he had done so on previous occasions and that the carman saw him untie the string and made no objection. The carman then removed one of the frames without retying the two remaining frames, leaving them standing unsecured. They directly afterwards fell on the plaintiff, causing him injuries in respect of which he sued the defendants for compensation under the Employers' Liability Act, 1880 :—*Held*, that there was on the above facts evidence of an injury to the plaintiff by reason of the negligence of a fellow workman to whose orders he was bound to conform, and did conform, and which resulted from his having so conformed. Millward *v.* Midland Railway Company - - 68

2. —— *Negligence — Negligence of Servant hired to drive Cart, Liability of Hirer for.*] D. contracted with the defendants, an urban authority, to supply by the day a driver and horse to drive and draw a watering-cart belonging to the defendants. The driver was employed and paid by D., and was not under the defendants' direction or control otherwise than that their inspector directed him what streets to water. In an action to recover damages for injuries caused by the negligent conduct of the driver whilst in charge of the cart.—*Held*, that the defendants were not liable.—*Quarman* v. *Burnett* (6 M. & W. 499) followed; *Rourke* v. *White Moss Colliery Co.* (2 C. P. D. 205) distinguished. Jones *v.* Corporation of Liverpool - 890

MAYOR'S COURT, LONDON—*Jurisdiction—Prohibition—Mayor's Court Procedure Act* (20 & 21 *Vict. c. clvii.*), *s.* 12—*Cause of Action arising wholly or in part within the City of London or Liberties thereof.*] The terms of a sale of the lease, goodwill and fixtures of a business carried

MAYOR'S COURT, LONDON—*continued.*
on in Surrey having been agreed upon orally, two counterpart documents were drawn up, embodying such terms. One of these was signed by the purchaser at Bow in the county of Middlesex. The other was subsequently signed by the vendor in the city of London. The two documents were then exchanged between the parties, and the deposit was paid at the office of the purchaser's solicitor in the city of London. The sum of 50*l.*, part of the purchase-money, being unpaid, the vendor sued for the same in the Mayor's Court:—*Held*, that the cause of action did not in part arise within the jurisdiction of the Mayor's Court, and that therefore a writ of prohibition must issue. ALDERTON *v.* ARCHER - - 1

METROPOLIS — Valuation list — Discretion of overseers - - - - 351
See POOR-RATE.

METROPOLIS LOCAL MANAGEMENT ACTS—*Metropolis—Order of Board to Overseers to levy Rate—Sealing—Issue of Order*—18 & 19 *Vict.* c. 120, *ss.* 158–161.] By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 158, every vestry and district board shall from time to time "by order under their seal require" the overseers of their parish to levy the sums which such vestry or board may require for defraying the expenses of the execution of the Act.—By s. 161 the overseers "to whom any such order as aforesaid is issued shall levy the amount mentioned therein according to the exigency thereof":—*Held* (per Stephen and Mathew, JJ., Day, J., dissenting), that such an order became effective when sealed, and service of it on the overseers was not necessary to authorize them to levy rates, but that rates made by overseers in pursuance of such order, after notice of it having been sealed, were valid. GLEN *v.* OVERSEERS OF FULHAM - - - - - - 328

METROPOLITAN BUILDING ACTS — *Foundations—Site—Removal of Fæcal, animal, or Vegetable Matter from Site—By-laws of Metropolitan Board of Works, Construction of — Metropolis Management and Building Acts Amendment Act*, 1878 (41 & 42 *Vict. c.* 32), *ss.* 14, 16.] By the Metropolis Management and Building Acts Amendment Act, 1878, s. 16, the Metropolitan Board of Works were empowered to make by-laws with respect to "the foundations of houses, buildings, and other erections, and the sites of houses, buildings, and other erections to be constructed after the passing of this Act, and the mode in which and the materials with which such foundations and sites shall be made, formed, excavated, filled up, prepared, and completed for securing stability, the prevention of fires, and for purposes of health." By s. 14 the term "site" is defined to mean "the whole space to be occupied by such house, building, or other erection between the level of the bottom of the foundations and the level of the base of the walls." The Metropolitan Board of Works made the following by-law: "No house, building, or other erection shall be erected upon any site or portion of any site which shall have been filled up or covered with any material impregnated or mixed with any fæcal, animal, or vegetable matter, or which shall have been filled up or covered with dust, or slop, or other refuse, or in or upon which any such matter or refuse shall have been deposited, unless and until such matter or refuse shall have been properly removed by excavations or otherwise from such site":—*Held*, that the meaning of the word "site" in the by-law was governed by the interpretation of that word in the Act, so that the by-law did not authorize the Metropolitan Board of Works to direct the removal of fæcal, animal, or vegetable matter in the soil below the level of the bottom of the foundations. BLASHILL *v.* CHAMBERS - - - - - 479

MINE—*Coal Mines Regulation Act*, 1872 (35 & 36 *Vict. c.* 76), *s.* 18—*Check-weigher, Appointment of — Qualification — Person "Employed in the Mine."*] By the Coal Mines Regulation Act, 1872, s. 18, the persons employed in a mine, and paid according to the weight of the mineral gotten by them, may, at their own cost, station a check-weigher at the place appointed for the weighing of such mineral, in order to take an account of the weight thereof on behalf of the persons by whom he is so stationed; and "the check-weigher shall be one of the persons employed either in the mine at which he is so stationed, or in another mine belonging to the owner of that mine."—The plaintiff, a check-weigher, duly appointed under s. 18, received a fortnight's notice to quit his employment from the men employed in the mine. Before the notice expired, the men held a fresh election, at which the plaintiff (with others) presented himself as a candidate, and was again appointed:—*Held*, that the true construction of s. 18 was to limit the class of persons from whom the men might appoint a check-weigher to persons employed in the mine by the mine-owner; that the plaintiff ceased to have any employment under the mine-owner when he was first appointed check-weigher by the men; and therefore that his second appointment was invalid. HOPKINSON *v.* CAUNT - 592

MOLESTATION—Separation deed—Covenant to pay annuity—Adultery of wife—Condition precedent - - - 792
See HUSBAND AND WIFE 4.

MONEY PAID — Indemnity — Goods lawfully seized for another's debt - - 811
See INDEMNITY.

MUNICIPAL CORPORATION—*Resignation of Corporate Office—Delivery of Resignation to Town Clerk—Power to withdraw Resignation—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 36.] Under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 36,—which enacts that a person elected to a corporate office may at any time, by writing signed by him and delivered to the town clerk, resign the office, on payment of the fine provided for non-acceptance thereof,—the resignation is completed by the delivery of the writing to the town clerk and the payment of the fine, and cannot afterwards, even with the assent of the corporation, be withdrawn. THE QUEEN *v.* CORPORATION OF WIGAN - - 908

MUNICIPAL ELECTION — *Election of Town Councillors—Petition against some only of the Candidates returned on a Ground affecting the Validity of the Election as a whole—Municipal*

MUNICIPAL ELECTION—*continued.*

Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *ss.* 87, 88, 91, 93, *Sched.* 3, *Part II., rules* 3 *and* 10.] An election petition may be presented under the Municipal Corporations Act, 1882, s. 87, against some only of the persons returned at a municipal election, although the ground of the petition is one affecting the validity of the election as a whole; and the Court can on such petition declare the persons so petitioned against not to have been duly elected. Line *v.* Warren - 73

2. —— *Election of Town Councillors—Petition against some only of the Candidates returned on a Ground affecting the Validity of the Election as a whole—Municipal Corporations Act,* 1882 (45 & 46 *Vict. c.* 50), *ss.* 87, 88, 91, 93, 242, *Sch.* 3, *Part II., rr.* 3 *and* 10—*Appeal—Municipal Election Petition—Special Case—Supreme Court of Judicature Act,* 1881 (44 & 45 *Vict. c.* 68), *s.* 14.] An election petition may be presented under the Municipal Corporations Act, 1882, s. 87, against some only of the persons returned at a municipal election, although the ground of the petition is one affecting the validity of the election as a whole; and the Court can on such petition declare the persons so petitioned against not to have been duly elected.—The three respondents and six other persons were nominated as candidates to fill four vacancies in the town council of a borough under the Municipal Corporations Act, 1882. An objection having been made to the nomination papers of H., and three other candidates (not the respondents), on the ground that they were invalid under Sch. 3, Part II, rule 10, because the persons subscribing the paper in each case had subscribed nomination papers of other candidates, the mayor erroneously held the objection to be good, being of opinion that rule 10 applied to a case where there were several vacancies. The objection to H. was withdrawn; but the three other candidates objected to were prevented from going to the poll, and at the election which was afterwards held, H., and the three respondents were declared duly elected. Upon a petition against the return of the respondents, to which H. was not a party, it was admitted that an election of town councillors where there are several vacancies, is governed by the Municipal Corporations Act, 1882, Sch. 3, Part II., rule 3, which provides that the same burgesses may subscribe as many nomination papers as there are vacancies, and that rule 10 does not apply to a case of several vacancies; and it was further admitted that as the objection would have been valid against all the candidates returned, the whole election might have been declared void if H. had been a party to the petition; but it was contended that as he was not before the Court, and therefore as his election could not be questioned, the return of the respondents must stand good:—*Held*, that although the erroneous decision of the mayor affected the validity of the whole election, nevertheless the Court had power to deal with those candidates returned who were petitioned against, and that the return of the respondents must be declared void, notwithstanding that the return of H. could not be questioned, he not being a party to the petition.—Judgment of the Queen's Bench Division (14 Q. B. D. 73) affirmed.—Notwithstanding s. 93, sub-s. 7, of the Municipal Corporations Act, 1882, which enacts that the decision of the High Court upon a petition questioning a municipal election shall be final, nevertheless an appeal, if leave be given, lies from a judgment of the Queen's Bench Division upon a petition of that nature to the Court of Appeal, owing to s. 242 of the statute above-mentioned, which in effect incorporates the Supreme Court of Judicature Act, 1881, s. 14, whereby in certain cases an appeal is allowed from the High Court of Justice to the Court of Appeal, if special leave be given. Line *v.* Warren [C. A. 548

MURDER—Killing and eating flesh of human being under pressure of hunger - 273
See Criminal Law. 3.

MUTUAL DEALINGS—Bill accepted and paid by creditor after notice of debtor's bankruptcy - - - - 963
See Bankruptcy. 19.

NEGLIGENCE—*Liability—Highway—Diversion—Owner of Land—Duty to fence.*] A duty is cast upon those who, in the exercise of statutory powers, divert a public footpath, to protect, by fencing or otherwise, reasonably careful persons using the footpath from injury through going astray at the point of diversion. Hurst *v.* Taylor [918

—— Driver of cart—Liability of hirer - 890
See Master and Servant. 2.

NOTICE OF ACTION—Constable—Trial in county where fact committed — Contagious Diseases (Animals) Act, 1878 - 720
See Constable.

NOTICE—Of motion—Appeal—Rejection of proof—Bankruptcy - - - 385
See Bankruptcy. 23.

—— Power to determine tenancy—Landlord and tenant - - - - 475
See Landlord and Tenant.

—— Transfer of shares—Equitable mortgage—Priority - - - - 424
See Company. 2.

NUISANCE—Urinal—Highway—Local Government Acts—Compensation - 928
See Local Government Acts. 2.

OATH—Parliament—Disbelief in Supreme Being—Penalty - - - - 667
See Parliament.

OFFICIAL RECEIVER—Bankruptcy—Costs—Personal liability—Unsuccessful appeal—
See Bankruptcy [48

—— Bankruptcy—Power of sale - - 407
See Bankruptcy. 27.

ORDER AND DISPOSITION—"Trade or business"—Farming and market gardening for pleasure - - - - 950
See Bankruptcy. 33.

PARLIAMENT—*Election—Oath of Allegiance—Disbelief in a Supreme Being—Oath not binding upon the Person taking it as an Oath, but only as a*

PARLIAMENT—*continued.*

Solemn Promise—Penalty—Parliamentary Oaths Act, 1866 (29 *Vict. c.* 19), *ss.* 3, 5—"*Solemnly and publicly made and subscribed*"—*Promissory Oaths Act*, 1868 (31 & 32 *Vict. c.* 72)—*Evidence—Journals of House of Commons—Practice of House of Commons—Practice—Appeal—Information by Attorney General to recover Penalty*—"*Criminal Cause or Matter*"—*Trial at Bar—Motion for New Trial on Ground of Misdirection and Misreception of Evidence—Notice of Motion—Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 19, 47.] A member of parliament, who does not believe in the existence of a Supreme Being, and upon whom an oath has no binding effect as an oath but only as a solemn promise, is, owing to his want of religious belief, incapable by law of "making and subscribing" the oath of allegiance appointed by the Parliamentary Oaths Act, 1866, ss. 1, 3, as amended by the Promissory Oaths Act, 1868; and if he takes his seat and votes as a member, although he has gone through the form of making and subscribing the oath appointed by those statutes, he will be liable upon an information at the suit of the Attorney General to the penalty imposed by the Parliamentary Oaths Act, 1866, s. 5.—*Omichund* v. *Barker* (1 Atkyns, 21; Willes, 538) followed and applied.—In order that the oath of allegiance imposed upon members of the House of Commons upon taking their seats by the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868, may be "solemnly and publicly made and subscribed" within the meaning of s. 3 of the former statute, it must be taken by a member with the assent of the House according to the requirements of the Standing Orders, and after he has been called upon by the Speaker to be sworn.—Upon the trial of an information at the suit of the Attorney General against a member of the House of Commons for voting without having taken the oath of allegiance within the meaning of the Parliamentary Oaths Act, 1866, as amended by the Promissory Oaths Act, 1868, evidence of the practice observed in the House of Commons as to taking the oath of allegiance is admissible for the purpose of explaining the construction of those statutes, and the journals of the House of Commons are admissible as evidence for the purpose of shewing, from the member's conduct as therein recorded, that owing to his want of religious belief he is by law incapable of taking an oath.—By Brett, M.R., and Lindley, L.J., Cotton, L.J., doubting, an information at the suit of the Attorney General to recover penalties under s. 5 of the Parliamentary Oaths Act, 1866, from a member of Parliament for voting without having taken the oath of allegiance required by that statute, as amended by the Promissory Oaths Act, 1868, is not a "criminal cause or matter" within the meaning of the Supreme Court of Judicature Act, s. 47, and an appeal may be brought from any order or judgment therein of the High Court to the Court of Appeal:—By Brett, M.R., on the ground that the information is in its nature a civil proceeding, and, therefore, that an appeal lies under the Supreme Court of Judicature Act, 1873, s. 19:—By Lindley, L.J., on the ground that even although the information may be to some extent of a criminal nature, nevertheless before the passing of the Supreme Court of Judicature Acts, 1873, 1875, an appeal would have lain under the Crown Suits Act, 1865 (28 & 29 Vict. c. 104), ss. 31, 34, 35, from a decision of the Court of Exchequer to the Court of Exchequer Chamber, and that the Supreme Court of Judicature Acts, 1873, 1875, do not take away any right of appeal existing before the passing of those statutes.—*Semble*, by Brett, M.R., that even if the information could be regarded as a criminal proceeding, nevertheless an appeal would lie, for by the Supreme Court of Judicature Act, 1873, s. 47, the right of appeal is taken away only in the case of indictments, of criminal informations for indictable misdemeanors filed in the Queen's Bench Division, and of criminal proceedings before justices. An appeal lies to the Court of Appeal from any order or judgment made or given by the Queen's Bench Division either during, or afterwards with respect to, a trial at bar of a civil proceeding, and whether or not the appeal is brought from a decision upon a motion for a new trial on the ground of misdirection or wrongful reception of evidence; but the appeal must be brought on by notice of motion, an ex parte application for a rule nisi to the Court of Appeal being irregular. The Attorney General *v.* Bradlaugh - - - C. A. 667

2. —— *Registration of Voters—Revision of List—Description of qualifying Property—Houses in Succession—Omission of one—Mistake—Amendment*—41 & 42 *Vict. c.* 26, *s.* 28.] The nature of the qualification of a voter was described on the parliamentary list as "Dwelling houses in succession," and the name and situation of the qualifying property were described in the fourth column of the list as "44, Oxford Street and 34, Prospect Place, Cowick Street." He had, in fact, occupied three houses in succession during the qualifying period, but the overseer by mistake omitted to specify the third house, viz. 31, Prospect Place, and the occupation of the two only as they appeared on the list was insufficient to give the vote. These facts were proved before the revising barrister, and he was asked to amend the fourth column, and did so by striking out the figures "44" and "34":—*Held*, by Stephen and Cave, JJ. (Lord Coleridge, C.J., dissenting), that under 41 & 42 Vict. c. 26, s. 28, the revising barrister had power to correct the mistake, although it should not have been corrected by striking out the numbers, and that the list should be amended by inserting "and 31" after the words "Oxford Street" in the fourth column of the list. Ford *v.* Hoar - - - - 507

3. —— *Registration—Qualification in List—Mistake in Statement of—Correction*—41 & 42 *Vict. c.* 26, *s.* 28, *sub-s.* 12.] The qualification of a voter was stated in the third column of the list to be "offices, successive occupation," and in the fourth column "High Street and Charles Street," whereas it was proved that during the whole of the qualifying period he had occupied one office only, namely, in High Street, and would have had by reason of such occupation a good and sufficient qualification. The misdescription was an error of the overseers:—*Held*, that the revising barrister had power under 41 & 42 Vict. c. 26, s. 28, to correct the mistake, and should have amended

PARLIAMENT—*continued.*
the list by striking out the words "successive occupation" and "Charles Street." Lynch *v.* Wheatley - - - - - 504

—— Special Act—Power to charge interest upon poor-rate—Opposition to bill by overseers—Costs - - - - - - 358
See Poor-rate. 2.

PARTNER—Bankruptcy—Proof by executors of deceased partner - - - 394
See Bankruptcy. 20.

PAYMENT INTO COURT—Denial of liability—Action for several breaches of contract
See Practice. 16. [766

POACHING—Search by constable in highway 725
See Game.

POOR LAW—*Settlement by Residence—Divided Parishes Act* (39 & 40 *Vict. c.* 61), *s.* 34—*Children under Seven.*] Upon appeal from an order of removal it appeared that seven years before the order the paupers, children then under seven years of age, were, on the death of their mother, placed by their father in the care of K., who resided at Chertsey, Surrey, and lived with him from that time continuously until they became chargeable. There was no evidence as to their residence before they went to Chertsey.—The children were visited by their father on three occasions only after they went to Chertsey, and then only for a few hours at a time, but he made a weekly payment for their maintenance, which was continued till his death, six years afterwards. The children never visited their father:—*Held*, that the father in sending the children to Chertsey must be taken to have intended that their absence should be permanent; that there was no evidence of any intention on his part to take them back to live with him, and that notwithstanding their infancy they acquired a settlement by residence in Chertsey, under 39 & 40 Vict. c. 61, s. 34. Guardians of Holborn *v.* Guardians of Chertsey - - - - - - 289

POOR-RATE — *Assessment — Valuation* (*Metropolis*) *Act*, 1869 (32 & 33 *Vict. c.* 67), *s.* 47—*Alteration of Value of Hereditament during Year—Provisional List—Default by Overseers in sending Provisional List—Discretion of Overseers.*] Where a requisition is made to the overseers of a parish to make and send to the assessment committee a provisional list under s. 47 of the Valuation (Metropolis) Act, 1869, containing the gross and rateable value of an hereditament, on the ground that the value has been increased or diminished during the year, the overseers are not bound to comply with the requisition if they are of opinion that no such alteration in value has taken place, and a mandamus will not be granted to compel them to do so. The Queen *v.* St. Mary Magdalene, Bermondsey - - - - - - 351

2. —— *Overseers of Parish—Bill in Parliament affecting Parish—Opposition by Overseers—Costs of Opposition.*] A private bill before Parliament provided for the punctual payment of interest on the share capital of the undertaking for which authority was sought by declaring that the overseers of the parish in which the undertaking was situated should, when required to do so, raise as part of the poor-rate money for the payment of such interest. The overseers, with the authority of the vestry, successfully opposed the bill, and in so doing incurred certain expenses which were not immoderate and were allowed by the auditor:—*Held*, reversing the decision of the Queen's Bench Division, that the overseers were entitled to charge the expenses so incurred upon the poor-rate. The Queen *v.* White **C. A.** 358

3. —— *Rateable Value—Mersey Docks and Harbour Board—Rateability of Lighthouse vested in and under the Management of the Board—Telegraph Station and Premises—Rateable Value enhanced by reason of Neighbourhood — Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *s.* 430.] The Mersey Docks and Harbour Board were possessed of a tower used as a lighthouse and also as a telegraph station, in respect of which they received tolls from vessels using their docks or entering the port of Liverpool, which tolls were directed by the statutes under which the board derived their authority to be so fixed, that, with the other receipts of the board applicable to conservancy purposes, they should not be higher than were necessary to meet the conservancy expenditure:—*Held*, that, inasmuch as the tower was incapable of profitable occupation, it was not rateable to the relief of the poor.—Two dwelling-houses adjoining the tower were used by the light-keepers, and if not so used in connection with the lighthouse might be let to tenants at a rent, and the rent would be enhanced by the fact that they had been built in the neighbourhood of the tower:—*Held*, that the rateable value of the dwelling-houses must be ascertained with reference to the fact, that they had been built in the neighbourhood of the tower.—By Lord Coleridge, C.J., and Mathew, J., sitting as judges of the Queen's Bench Division, the lighthouses which are exempted from rating by s. 430 of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), are those only, the superintendence and management of which is by s. 389 vested in the Trinity House, the Commissioners of Northern Lighthouses, and the Port of Dublin Corporation, and not lighthouses under the control and management of local authorities, such as the Mersey Docks and Harbour Board. Mersey Docks and Harbour Board *v.* Overseers of Llaneilian - - - - **C. A.** 770

4. —— *Salary derived from Poor-rate—Disqualification of Guardian*—5 & 6 *Vict. c.* 57, *s.* 14—*Clerk of Highway Board—Clerk of School Board—Payment out of Funds raised in a Poor-rate*—27 & 28 *Vict. c.* 101, *s.* 32; 33 & 34 *Vict. c.* 75.] The Act 5 & 6 Vict. c. 57, s. 14, which enacts that "no person receiving any fixed salary . . . from the poor-rates in any parish or union shall be capable of serving as a guardian in such parish or union" does not apply to the clerk of a highway board or of a school board whose salary is paid out of the highway or school board fund collected as a poor-rate by the overseers in pursuance of precepts issued to them under the Highway Act, 1864, 27 & 28 Vict. c. 101, or the Elementary Education Act, 1870, 33 & 34 Vict. c. 75, respectively. The Queen *v.* Rawlins. The Queen *v.* Dibbin 325

5. —— *Telephone Company — Rateable Occupation — "Wayleaves" — Overhead Wires and Apparatus attached to Roofs and Chimneys of*

POOR-RATE—*continued.*

Houses.] A telephone company were possessed of an exchange by means of which subscribers could communicate by telephone with each other, and also of wires and telephone apparatus unconnected with the exchange for the use of persons renting them. For the purpose of this business they laid wires from their office to the business premises of their subscribers, and also erected wires for the use of those who rented them. All these wires were overhead wires and were carried from the office of the company to the different premises, being supported and steadied either by poles fixed in the ground, or by being attached to the roofs, chimneys, or walls of some of the buildings over which they passed. The attachments were made in the case of a single wire by an iron spike driven into the building, or by a bolt screwed into the ridge, or by an iron bracket nailed to the corner of the chimney to which the wire was attached, or in the case of a number of wires by means of standards or ridge-saddles attached to the roofs of the buildings and fastened by iron bolts or stays. The consent of the owners or occupiers of the lands or buildings was given by agreements in which the company undertook to pay an annual rent and to remove the wires and attachments, upon a certain notice. The company had no key of the outside doors, and could only obtain access to the roofs by the permission of the occupiers:—*Held*, affirming the decision of the Queen's Bench Division, that upon these facts there was proof of an occupation of land by the wires of the company, and that they were rateable. LANCASHIRE TELEPHONE CO. *v.* OVERSEERS OF MANCHESTER - **C. A. 267**

6. —— *Union Assessment Committee Acts* (25 & 26 *Vict. c.* 103), *s.* 19; (27 & 28 *Vict. c.* 39), *s.* 1—*Power to amend Valuation List*—"*Notice of objection in manner provided by* 25 & 26 *Vict. c.* 103, *with respect to objections*"—*Omission to give Notice of Meeting of Committee to Overseers.*] Under the "Union Assessment Committee Amendment Act, 1864," 27 & 28 Vict. c. 39, s. 1,—which enables the assessment committee to hear objections against a valuation list approved by the committee, and to amend such list, "after notice given at any time in the manner prescribed by 25 & 26 Vict. c. 103, with respect to objections,"—an amendment of the list is valid, although no notice of the meeting of the committee was given to the overseers of the parish to which the list relates as required by 25 & 26 Vict. c. 103, s. 19. THE QUEEN *v.* OVERSEERS OF LANGRIVILLE. THE QUEEN *v.* OVERSEERS OF COPPING SYKE - - - - - - - **83**

PRACTICE—*Appeal—Appeal to House of Lords—Stay of Execution—No Special Grounds alleged.*] Execution for costs pending an appeal from the Court of Appeal to the House of Lords will not be stayed, unless evidence be adduced to shew that the respondent to the appeal will be unable to repay the amount levied by execution, if the appellant be successful before the House of Lords. BARKER *v.* LAVERY - - **C. A. 769**

2. —— *Attachment of Debts—Judgment—Lapse of Six Years since—Garnishee Order to pay—Order XLII., rr.* 6, 8, 22, 23—*Order XLV., r.* 1.] A garnishee against whom proceedings under Order XLV. have been duly taken, may be ordered to pay to a judgment creditor a debt due from such garnishee to the judgment debtor, although more than six years have elapsed since the judgment. FELLOWS *v.* THORNTON - **335**

3. —— *Action in formâ pauperis—Taxation of Plaintiff's Costs—Remuneration for Solicitor and Fees for Counsel—Rules of Supreme Court,* 1883, *Order XVI., rr.* 24, 25, 26, 27, 31.] Under the Rules of the Supreme Court, 1883, Order XVI., rr. 24, 25, 26, 27, 31, a successful plaintiff in an action in formâ pauperis tried before a judge and jury is entitled upon taxation as against the defendant to costs out of pocket only, and cannot be allowed anything for remuneration to his solicitor or fees to counsel. CARSON *v.* PICKERSGILL - - - - **C. A. 859**

4. —— *Costs—Action of Contract which could not have been brought in County Court—Judgment for Sum not exceeding* 50*l.*—*Order LXV., r.* 12.] By Order LXV., rule 12, in actions founded on contract in which the plaintiff recovers by judgment or otherwise a sum (exclusive of costs) not exceeding 50*l.*, he shall be entitled to no more costs than he would have been entitled to had he brought his action in a county court, unless the Court or a judge otherwise orders:—*Held*, that this rule does not apply to actions which could not have been brought in a county court. SAYWOOD *v.* CROSS - - - - - **53**

5. —— *Costs—Action remitted for Trial to County Court—Order LXV., rr.* 1, 4.] By Order LXV., rule 1 (Rules of the Supreme Court, 1883) the costs of and incident to proceedings in the Supreme Court are to be in the discretion of the Court or Judge, subject to a proviso where an action is tried with a jury. By rule 4 of the same Order, where an action is ordered to be tried in a county court under 19 & 20 Vict. c. 108, s. 26, the costs of the action are subject to these rules to follow the event, unless by the registrar's certificate of the result of the trial, it appears that the county court judge was of opinion that the question ought to be referred to a judge of the High Court, in which case no costs are to be recovered unless ordered by the Court or a judge.—Where an action has been ordered to be tried in a county court under 19 & 20 Vict. c. 108, s. 26, and has been so tried there, the High Court retains its power under Order LXV., rule 1, of dealing with the costs of the action, notwithstanding rule 4 of that order, and the absence in the registrar's certificate of any expression of opinion by the county court judge as provided for by that rule. EMENY *v.* SANDES - - - - - **C. A. 6**

6. —— *Costs—Arbitration—Reference of Cause and all Matters in difference—Costs of Action and Reference to abide Event—"Event" construed distributively.*] An action and all matters in difference were referred, the costs of the cause, reference, and award to abide the event:—*Held*, on the authority of *Ellis* v. *Desilva* (6 Q. B. D. 521), that the word "event" must be construed distributively; and that consequently, upon an award by which the arbitrator decided in the plaintiff's favour upon the claim in the action, but in the defendant's favour upon a matter in difference not

PRACTICE—*continued.*

raised in the action, the plaintiff was entitled to the costs of the action and the defendant to the costs of the matter on which he had succeeded.—*Gribble* v. *Buchanan* (18 C. B. 691; 26 L. J. (C.P.) 24) not followed. HAWKE *v.* BREAR - **841**

7. —— *Costs—Claim for Debt and Counter-claim for Debt—Arbitration—Order of Reference —" Costs of cause, reference, and award, shall abide the event"—Award—Entry of Judgment—Costs where the Plaintiff succeeds on Claim, and the Defendant on Counter-claim—Costs of Issues found in favour of Party, against whom Judgment in Action is entered.*] A plaintiff having claimed for goods sold and delivered, and for commission, and the defendants having counter-claimed for moneys collected by the plaintiff on the defendants' account and for work and labour, the action was referred to an arbitrator under an order of reference whereby "the costs of the cause, and the costs of the reference and award shall abide the event." The arbitrator found the issues on the claim in favour of the plaintiff, and awarded him a sum of money in respect thereof, and found the issues on the counter-claim in favour of the defendants, and awarded to them a sum of money in respect thereof. After deducting the sum found for the plaintiff from the sum found for the defendants, a balance of 97*l.* was due to the defendants:—*Held*, that the word "event" in the order of reference must be construed distributively, and that judgment must be entered for the defendants, who were entitled to the costs of the action, reference, and award, but that the plaintiff was entitled to the costs of the issues found in his favour.—*Baines* v. *Bromley* (6 Q. B. D. 691) explained. LUND *v.* CAMPBELL - - - - **C. A. 821**

8. —— *Costs—Order as to Supreme Court Fees, 1884, Schedule 52—Fee for "entering cause or matter for trial or hearing"—Rule ordering Justice to hear Application for Summons.*] Under the Order as to Supreme Court Fees, 1884, Schedule 52—which directs that a fee of 2*l.* shall be paid "on entering or setting down, or re-entering or re-setting down an appeal to the Court of Appeal, or a cause or matter for trial or hearing in any court in London or Middlesex, or at any assizes"—such fee is payable though the matter for hearing does not arise in an action, as in the case of a rule nisi against a justice under 11 & 12 Vict. c. 44, s. 5. EX PARTE HASKER - - - - - **82**

9. —— *Security for Costs—Interpleader by Sheriff—Defendant in Issue liable to give Security for Costs.*] In an interpleader issue directed upon an application by a sheriff, who has received a notice of a claim to goods seized by him under a writ of fieri facias in execution of a judgment, both the plaintiff and the defendant in the issue are really in the position of the plaintiffs in an ordinary action, and, therefore, the defendant in the interpleader issue may be ordered to give security for costs in any case in which a plaintiff may be so ordered, and the rule, that a defendant cannot be compelled to give security for costs, does not apply.—*Williams* v. *Crosling* (3 C. B. 957) followed.—*Belmonte* v. *Aynard* (4 C. P. D. 221, 352) distinguished. TOMLINSON *v.* LAND AND FINANCE CORPORATION - - - **C. A. 539**

PRACTICE—*continued.*

10. —— *Ejectment—Relief against Forfeiture —Non-payment of Rent—Relief after Trial—Disallowance of Costs to Plaintiff—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 210; *Common Law Procedure Act*, 1860 (23 & 24 *Vict. c.* 126), *s.* 1.] Where in an action of ejectment upon a forfeiture by non-payment of rent the plaintiff obtains judgment, but without costs, the defendant may obtain relief from the forfeiture under the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 1, without being required to pay the plaintiff any costs other than those of the summons for relief. CROFT *v.* LONDON AND COUNTY BANKING CO. - **C. A. 347**

11. —— *Interpleader—Appeal—Judge finally disposing of whole Matter—Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 19—*Rules of the Supreme Court*, 1883, *Order XL.*, *r.* 5; *Order LVII.*, *r.* 13.] When an interpleader issue has been tried by a judge and a jury, and upon the finding of the jury the judge has, under Order LVII., r. 13, pronounced judgment disposing of the whole matter of the interpleader proceedings, but has given leave to appeal, a party to the issue who is dissatisfied with both the finding of the jury and the judgment of the judge, may appeal under Order XL., r. 5, to a Divisional Court of the Queen's Bench Division, and under the Supreme Court of Judicature Act, 1873, s. 19, from that Court to the Court of Appeal.—*Semble*, that *Burstall* v. *Bryant* (12 Q. B. D. 103) was wrongly decided. ROBINSON *v.* TUCKER - **C. A. 371**

12. —— *Interpleader by Sheriff—Fi. fa.—Order LVII.*, *r.* 1 (*b*)—*Proceeds or Value of Goods taken in Execution—Money paid to Sheriff under Protest —Trespass on Land of Person other than Execution Debtor—Protection to Sheriff against Action for Trespass.*] Where the sheriff seized goods under a fi. fa. and a person other than the person against whom the process issued claimed the goods and paid out the sheriff under protest:—*Held*, that the money so paid to the sheriff under protest was the proceeds of goods taken in execution within the meaning of Order LVIII., rule 1 (*b*), and that therefore the sheriff was entitled to interplead in respect thereof.—By the Court,—Where the sheriff in the execution of a fi. fa. enters the premises of a person other than the execution debtor and there seizes goods believing erroneously that such goods belong to the execution debtor, the sheriff may, upon interpleader proceedings, be protected against an action for trespass to the land as well as against an action for seizure of the goods, if no substantial grievance has been done to the person whose premises are wrongfully entered.—*Hollier* v. *Laurie* (3 C. B. 334) discussed, and *Winter* v. *Bartholomew* (11 Ex. 704; 25 L. J. (Ex.) 62) approved. SMITH *v.* CRITCHFIELD - - - **C. A. 873**

13. —— *Interpleader—Trial of Issue—Appeal from Judgment of Judge on such Trial.*] Where it is sought to impeach the judgment of a judge on the trial of an interpleader issue with respect only to the finding of the facts or the ruling of the law, and not with respect to the final disposal of the whole matter of the interpleader proceedings, an appeal will lie from such judgment under

PRACTICE—*continued.*

s. 19 of the Judicature Act, 1873, as it will from any other judgment or order of a judge. Dawson *v.* Fox - - - - - - C. A. 377

14. —— *New Trial—Action remitted to the County Court for Trial of Issues under* 19 & 20 *Vict. c.* 108, *s.* 26—*Order XXXIX. of the Rules of* 1883—*Order LII., r.* 1—*County Courts Act,* 1875 (38 & 39 *Vict. c.* 50), *s.* 6.] Rules 3 and 4 of Order XXXIX., and Rule 1 of Order LII. (of 1883), have no application to cases sent for trial to a county court under 19 & 20 Vict. c. 108, s. 26; applications for new trials, therefore, are still regulated by the old practice. Pritchard *v.* Pritchard - - - - - - 55

15. —— *Notice of Trial, Right of Defendant to give — Abridgment of Time — Order XXXVI., r.* 12; *Order LXIV., r.* 7.] Order XXXVI., r. 12, provides that, if the plaintiff does not within six weeks after the close of the pleadings, or within such extended time as the Court or a judge may allow, give notice of trial, the defendant may, before notice of trial given by the plaintiff, give notice of trial, or may apply to the Court or judge to dismiss the action for want of prosecution.—Order LXIV., r. 7, provides that the Court or a judge shall have power to enlarge or abridge the time appointed by the rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require:—*Held,* that the period of six weeks mentioned in Order XXXVI., r. 12, is not a time appointed for doing any act or taking any proceeding within Order LXIV., r. 7, and consequently that the Court could not make an order giving the defendant leave to give notice of trial, if the plaintiff did not give such notice within a shorter period than six weeks from the close of the pleadings. Saunders *v.* Pawley 234

16. —— *Payment into Court—Denial of Liability—Action for several Breaches of Contract—Payment into Court in respect of One Breach—Acceptance in Satisfaction of all Demands—Rules of the Supreme Court,* 1883, *Order XXII., rr.* 6, 7.] In an action for breach of contract assigning two distinct breaches, the defendants pleaded denying the breaches, and alternatively paid money into Court with regard to one of the breaches. The plaintiffs gave notice under Order XXII., r. 7, that they accepted the money paid into Court in full satisfaction of the causes of action in the statement of claim:—*Held,* that the plaintiffs were entitled, without proceeding to judgment, to their costs of the action; for by accepting the money paid into Court in satisfaction of all their alleged causes of action they had in effect discontinued or withdrawn the action as to the breach, in respect of which the money was not paid in.—Decision of the Queen's Bench Division (13 Q. B. D. 897) affirmed. M'Ilwraith *v.* Green [C. A. 766

17. —— *Proceeding—No Proceeding for a Year—Notice—Rules of Supreme Court,* 1883, *Order XIII., r.* 3; *Order LXIV., r.* 13.] Where on default of appearance by the defendant the plaintiff takes no step in the cause for a year, Order LXIV., r. 13, applies, and notice is necessary before judgment can be signed. Webster *v.* Myer - - - - - - C. A. 231

PRACTICE—*continued.*

18. —— *Service of Writ on one Member of a Trading Partnership—Appearance by him only "as a partner of the firm"—Order XII., r.* 15.] A writ was issued against a trading partnership (unincorporated), and served upon a member of the firm, who entered an appearance, "W. N., a partner of the firm of W. T. & Co." There was no service upon or appearance by the other members of the firm:—*Held,* that leave to sign judgment against the firm for default of appearance could not be granted.—*Jackson* v. *Litchfield & Sons* (8 Q. B. D. 474) followed. Adam *v.* Townend - - - - - - 103

19. —— *Service of Writ out of Jurisdiction—Action for Rent of Land in England—Defendants domiciled or ordinarily resident in Scotland—Judicature Acts,* 1883, *Order XI., r.* 1 (*b*), (*e*).] Order XI., r. 1, does not enable the Court or a judge to allow service out of the jurisdiction of a writ in an action for non-payment of rent due under a lease of land in England against defendants who are domiciled or ordinarily resident in Scotland. Agnew *v.* Usher - - 78

20. —— *Set-off for Damages or Costs—Solicitor's Lien—Cross Judgments in Separate Actions—Order LXV., r.* 14.] The Court upon an application to set off cross judgments in distinct actions are entitled, notwithstanding Order LXV., r. 14, to order that the set-off shall be subject to the lien for costs of the solicitor of the opposite party—for assuming that rule 14 applies to a set-off in distinct actions, it leaves the Court a discretion to allow the set-off, either subject to or notwithstanding the solicitor's lien, and if it has no application the Court have the same discretion by the practice previous to Reg. Hil. Term, 1853, r. 63, which, since the repeal of that rule by the new rules, is revived. Edwards *v.* Hope [C. A. 922

—— Action by husband against wife—Separate estate - - - - - 831
See Husband and Wife.

—— Mandamus—Return of unconditional compliance - - - - - 13
See Mandamus.

PRESCRIPTION—Liability by frontager to repair sea wall—Extraordinary violence of sea
See Sea Wall. [561

PRINCIPAL AND AGENT—*Bank Shares, Contract for Sale of*—30 & 31 *Vict. c.* 29, *s.* 1—*Omission to specify Numbers—Brokers' Right to Indemnity—Stock Exchange, Usage of.*] The defendant employed the plaintiffs, who were stockbrokers on the Stock Exchange, to buy shares in a joint stock banking company. He had on many previous occasions employed the plaintiffs to buy similar shares, and on none of those occasions did the contract or advice note forwarded to him specify the distinguishing numbers of the shares purchased. The plaintiffs purchased the shares from a jobber on the Stock Exchange in the usual way, and forwarded to the defendant a contract note in the usual form, stating that the contract was made subject to the rules and regulations of the Stock Exchange. The contract was not made with reference to any distinguishing numbers of the shares, nor did the contract note specify any

PRINCIPAL AND AGENT—*continued.*

numbers. It is not the practice on the Stock Exchange to specify the numbers of the shares in dealing in bank shares. The defendant before the settling-day wrote to the plaintiffs repudiating the contract, on the ground that the numbers of the shares were not specified pursuant to 30 & 31 Vict. c. 29, s. 1. Notwithstanding such repudiation, the plaintiffs completed the contract and paid for the shares. By the rules of the Stock Exchange the committee only recognise the members of the Stock Exchange as the parties to contracts, and if a member does not carry out a contract he may be declared a defaulter and expelled from the Stock Exchange, and "no application, which has for its object to annul any bargain on the Stock Exchange, shall be entertained by the committee unless upon an allegation of fraud or wilful misrepresentation."—The plaintiffs sued the defendant to recover the price of the shares paid by them:—*Held*, by Mathew, J., on the authority of *Read* v. *Anderson* (13 Q. B. D. 779), that the plaintiffs were entitled to recover. Seymour *v.* Bridge - - - - - 460

2. —— *Stock Exchange, Usage of — Bank Shares, Contract for Sale of—Failure to specify Numbers of Shares*—30 & 31 *Vict. c.* 29, *s.* 1—*Brokers' Right to Indemnity.*] The defendant instructed the plaintiffs, who were stockbrokers at Bristol, to purchase for him shares in a joint stock banking company on the Stock Exchange. The plaintiffs gave directions accordingly to their London agents, brokers on the Stock Exchange, who purchased the shares from jobbers on the Stock Exchange in the usual way, no distinguishing numbers being specified with regard to the shares so purchased. It is not the practice on the Stock Exchange in effecting contracts for the sale of bank shares to specify the numbers, it having been found practically impossible, having regard to the exigencies of business, to comply with 30 & 31 Vict. c. 29 (Leeman's Act), s. 1.—By the rules of the Stock Exchange it is provided that the Stock Exchange shall not recognise in its dealings any other persons than its own members, such members, if they do not carry out contracts, being liable to be declared defaulters and expelled from the Stock Exchange, and that no application to annul a contract shall be entertained by the committee of the Stock Exchange unless upon a specific allegation of fraud or wilful misrepresentation. Before the settling-day arrived the defendant gave notice to the plaintiffs that he repudiated and declined to complete the purchase of the shares, but, the committee of the Stock Exchange refusing to annul the contract, the plaintiffs proceeded to complete the same and pay the price of the shares. The defendant was ignorant of the usage of the Stock Exchange with regard to dealings in the shares of banking companies, and did not know that the purchasing broker was by such usage rendered liable to perform a contract for the purchase of banking shares though void at law under Leeman's Act:—*Held*, by Grove, J., that the plaintiffs were not entitled to recover from the defendant the money paid by them as the price of the shares.—*Read* v. *Anderson* (13 Q. B. D. 779) and *Seymour* v. *Bridge* (14 Q. B. D. 460) distinguished on the ground that the defendant in the present case was ignorant of the usage. Perry *v.* Barnett - - - - - 467

PROHIBITION—*Inferior Court—Jurisdiction—Salford Hundred Court of Record Act*, 1868 (31 & 32 *Vict. c. cxxx.*), *s.* 7.] Sect. 7 of the Salford Hundred Court of Record Act, 1868, enacts that "no defendant shall be permitted to object to the jurisdiction of the Court otherwise than by special plea, and, if the want of jurisdiction be not so pleaded, the Court shall have jurisdiction for all purposes":—*Held*, that the defendant, against whom judgment had been recovered in the Salford Hundred Court, he not having pleaded to the jurisdiction, could not have a writ of prohibition on the ground of want of jurisdiction, inasmuch as the above-mentioned section under the circumstances conferred jurisdiction on the Salford Hundred Court.—*Oram* v. *Brearey* (2 Ex. D. 346) overruled. Chadwick *v.* Ball - - C. A. 855

—— Mayor's Court—Jurisdiction—Cause of action arising wholly or in part within city of London - - - - - 1
See Mayor's Court.

PROOF—Amendment of—Bankruptcy - 121
See Bankruptcy. 34.

—— Bankruptcy—Judgment debt—Evidence
See Bankruptcy. 24. [604

—— Bankruptcy—Judgment debt—How far conclusive - - - - - 606
See Bankruptcy. 26.

—— Rejection of—Bankruptcy—Appeal—Notice of motion - - - - 385
See Bankruptcy. 23.

RAILWAY COMPANY — *Carrier* — *Railways Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 20), *s.* 90—"*Passing only over the same Portion of the Line*"—"*Under the like circumstances*"—"*In favour of or against any particular Person*"—*Unequal Tolls—Group Rates—Undue Preference—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 2, 3, 6—*Action for Breach of Railway and Canal Traffic Act*, 1854, *whether maintainable.*] No action will lie in respect of any breach of the provisions of the Railway and Canal Traffic Act, 1854, s. 2.—Judgment of the Queen's Bench Division (13 Q. B. D. 674) as to this point affirmed.—A railway company carried coals eastwards to various towns from a group of collieries situate at different points along their line, and charged one uniform set of rates in respect of the carriage to all the collieries comprised in the group. In an action for overcharges by the owners of the colliery lying furthest eastwards:—*Held*, that inasmuch as the terminus of the transit over the company's line differed with respect to each colliery comprised in the group, the company had not contravened the provisions of the Railways Clauses Consolidation Act, 1845, s. 90, and therefore were not liable in the action.—Judgment of the Queen's Bench Division (13 Q. B. D. 674) as to this point reversed.—A railway company carried coal from certain collieries, including the D. colliery, situate in the Y. coalfield, to the port of G., where a line of steamers called which traded to the West Indies; in order to introduce the coal carried by them to the West

RAILWAY COMPANY—*continued.*

Indian market, the railway company agreed to allow B. 8*d.* per ton in respect of all coal shipped on board the steamers in order to be carried to the West Indies. The railway company agreed also to allow B. 6*d.* per ton upon all coal shipped for certain ports, in view of the anticipated advantage to themselves by the increased tonnage to be carried over their line. The owners of the D. colliery also sent coals over the line of the railway company to the same port of G., but not for shipment to the West Indies or to the ports above-mentioned, and claimed to recover from the railway company overcharges in respect of the coal thus sent by them, on the ground of the allowances of 8*d.* per ton and 6*d.* per ton made to B.:—*Held*, as to the coals carried by the railway company for B. from the Y. coalfield other than those coming from the D. colliery, that the termini of the transit from the collieries being different, the owners of the D. colliery could not recover for overcharges:—*Held*, as to the coals carried by the railway company for B. coming from the D. colliery, on the authority of *Great Western Ry. Co.* v. *Sutton* (Law Rep. 4 H. L. 226), and *London and North Western Ry. Co.* v. *Evershed* (3 App. Cas. 1029), that the railway company, by making the allowances of 8*d.* per ton and 6*d.* per ton, had contravened the Railways Clauses Consolidation Act, 1845, s. 90, but that the owners of the D. colliery had not proved any damage by reason of the allowances to B., and therefore could not recover from the railway company for overcharges.—A railway company were carriers of coal for B. and J., who were coal merchants, to G. The trucks with the coals intended for them upon the arrival at G. were taken direct to their yards, and it cost the railway company less to deliver the trucks straight into the yards of B. and J., than to keep the trucks in the goods-yard of the company until the trucks should be unloaded. The railway company thereupon allowed B. sometimes 2*d.* and sometimes 6*d.* per ton, and J. 4*d.* per ton. B. and J. obtained coals from many collieries situate upon the line of the railway company, and the railway company, as might be convenient to them, returned the trucks of B. and J. to any colliery with which they had dealings. It was cheaper for the railway company to be at liberty to send the trucks at their pleasure to any colliery with which B. and J. had dealings than to be compelled to return them to a particular colliery, and therefore they allowed B. and J. a rebate of 2 per cent. upon their respective nett debits. The saving to the railway company did not adequately represent the allowances of 6*d.* or 4*d.* per ton, or the rebate of 2 per cent. The owners of a colliery also sent their coals along the line of the railway company to G., but their trucks were kept in the goods-yards of the railway company until they were unloaded, and after being unloaded were returned straight to the colliery. The owners of the colliery having claimed to recover from the railway company for overcharges in respect of the allowance of 6*d.*, 2*d.*, and 4*d.* per ton, and of the rebate of 2 per cent.:—*Held*, that the railway company carried for B. and J. under circumstances different from those under which they carried for the owners of the colliery, and that the latter were not entitled to recover in respect of the alleged overcharges. Manchester, Sheffield, and Lincolnshire Railway Company *v.* Denaby Main Colliery Company - - - - - - **209**

—— Passenger's luggage—Delivery to passenger—Termination of company's risk **228**
See Carrier.

REGISTRATION — Association of more than twenty members - - - **379**
See Company.

RENT-CHARGE — *Apportionment — Release of Part of the Hereditaments*—22 & 23 *Vict. c.* 35, *s.* 10.] The effect of 22 & 23 Vict. c. 35, s. 10, is that where the owner of land, which is subject to a rent-charge, sells and conveys such land in separate portions to different persons, and the person entitled to the rent-charge joins in the conveyance of one only of such portions and releases it from the rent-charge, without the concurrence of the person to whom the other portion has been conveyed, the whole of such rent-charge is not extinguished, but only a proportionate part of it can be recovered from the person to whom the unrelased portion was conveyed. Booth *v.* Smith - - - - - **C. A. 318**

REPUTED OWNERSHIP—Hiring of furniture—Trade custom - - - **636**
See Bankruptcy. 32.

—— Wife's separate property in possession of husband—Marriage settlement made in foreign country - - - **417**
See Bankruptcy. 31.

RES JUDICATA—Separate actions—In respect of same wrongful act - - - **141**
See Judgment recovered.

RESIGNATION — Corporate office — Power to withdraw resignation - - **908**
See Municipal Corporation.

REVENUE—*Income Tax — Coal Mines — Dead Rent—Royalties—Deductions from Gross Profits—Provision for recouping Dead Rents out of Royalties, Effect of*—5 & 6 *Vict. c.* 35, *s.* 60 (*Sched. A.*), *r.* 3; *Sect.* 100 (*Sched. D.*)—29 & 30 *Vict. c.* 36, *s.* 8.] By an agreement for lease of coal mines for a term of years from March, 1874, the lessees agreed to pay a dead rent for the mines, and royalties at specified rates per ton on all coal worked; the dead rent to be recoupable out of royalties during the first sixteen years of the term—the effect being, that the lessor received on account of his share of the profits of the concern not less than a fixed annual sum; so that when his share of the royalties did not amount to the fixed sum he received that sum; but when his share of the royalties exceeded the fixed sum he received that sum only until the lessees had been reimbursed the excess paid to the lessor when his share of the royalties did not amount to the fixed sum. The lessees worked the mines for the first time in October, 1880, having paid the dead rent, less income-tax, to the lessor up to that year. Upon an assessment to the income-tax, made upon the lessees under Schedule D, for the year 1881-2, it appeared that the lessor's share of the royalties for that year had exceeded the dead rent by the sum of 1477*l.*:—*Held*, that, in estimating the pro-

REVENUE—*continued.*

fits of the concern for the particular year for the purpose of being assessed under the Income Tax Acts, the lessees were not entitled to deduct the 1477*l.* from their gross profits. Broughton Coal Company *v.* Kirkpatrick - - - 491

2. —— *Inhabited House Duty—Exemption—Caretaker—Servant or other Person—Customs and Inland Revenue Act,* 1878 (41 *Vict. c.* 15), *s.* 13, *sub-s.* 2—*Customs and Inland Revenue Act,* 1881 (44 *Vict. c.* 12), *s.* 24.] A female caretaker resided on premises, and it was a condition of her employment that her son, who was a clerk employed elsewhere, should sleep on the premises for their better protection:—*Held,* that the premises were not exempt from inhabited house duty under 41 Vict. c. 15, s. 13, sub-s. 2. Weguelin *v.* Wayall - - - - 838

3. —— *Income Tax—Insurance Company—"Annual Profits or Gains"—Sums paid as Bonuses to participating Policy-holders.*] A life insurance company issued "participating policies," according to the terms of which any surplus which existed at the end of each quinquennial period in the hands of the company, after payment of policies falling due during such period and provision for outstanding liabilities, was dealt with as follows: two thirds of the surplus went to the policy-holders, who received payment thereof either by way of bonus or abatement of premium; the remaining third of the surplus went to the company, who bore the whole expenses of the business, the portion remaining after payment of expenses constituting the only profit available for division among the shareholders:—*Held,* by Brett, M.R., and Cotton, L.J. (Lindley, L.J., dissenting) that the sums payable to the participating policy-holders as above-mentioned did not constitute "profits or gains" of the company assessable to income tax. Last *v.* London Assurance Corporation - - - - C. A. 239

4. —— *Probate Duty—Lunatic—Accumulations of Personal Estate—Investment in Realty—Conversion.*] The committees of a lunatic acting under the orders of the Lords Justices of Appeal sitting in Lunacy invested the accumulations of the personal estate of the lunatic in the purchase of land. The conveyances to the committees contained, in conformity with such orders, declarations that the land purchased should to all intents and purposes be considered as part of the personal estate of the lunatic, but contained no trust for sale:—*Held,* that on the death of the lunatic the value of the investment was personal estate liable to probate duty. Attorney General *v.* Marquess of Ailesbury - - - - 895

RULES:

—— **Order XI., r. 1** (*b*) (*e*) - - - 78
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—— **Order XII., r. 15** - - - 103
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—— **Order XIII., r. 3** - - - 231
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—— **Order XVI., rr. 24, 25, 26, 31** - - 859
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—— **Order XXII., rr. 6, 7** - - - 766
See Practice. 16.

RULES—*continued.*

—— **Order XXXVI., r. 12** - - - 234
See Practice. 15.

—— **Order XXXIX.** - - - - 55
See Practice. 14.

—— **Order XL., r. 5** - - - - 371
See Practice. 11.

—— **Order XLII., rr. 6, 8, 22, 23** - - 335
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—— **Order XLV., r. 1** - - - 335
See Practice. 2.

—— **Order LII., r. 1** - - - - 55
See Practice. 14.

—— **Order LIII., r. 9** - - - 13
See Mandamus.

—— **Order LVII., r. 1.** (*b*) - - - 873
See Practice. 12.

—— **Order LVII., r. 13** - - - 371
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—— **Order LVIII., r. 15** - - - 121
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—— **Order LXIV., r. 7** - - - 234
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—— **Order LXIV., r. 13** - - - 231
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—— **Order LXV., rr. 1, 4** - - - 6
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—— ——., **r. 12** - - - - 53
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—— ——., **r. 14** - - - - 922
See Practice. 20.

—— **Order LXVIII., r. 1** - - - 13
See Mandamus.

—— **Order LXXII., r. 2** - - - 13
See Mandamus.

SEA WALL—*Prescription, Liability by, of Frontager to repair Sea Wall—Extraordinary Violence of the Sea—Act of God—Sewers, Commissioners of, Order by, to repair Sea Wall, Effect of—Land Drainage Act,* 1861 (24 & 25 *Vict. c.* 133), *s.* 33—*Disqualification of Commissioners by reason of Interest*—23 *Hen.* 8, *c.* 5; 13 *Eliz. c.* 9.] The extent of the liability of a frontager to repair a sea wall, whether arising by tenure, prescription, or custom, can only be ascertained by usage.—J. A. was a frontager in a level on the Essex shore of the Thames under the jurisdiction of Commissioners of Sewers. An ancient sea wall protected the level against incursions of the sea. There was evidence proving a prescriptive liability on the part of the frontagers in the level to maintain and repair this sea wall. A portion of the sea wall in front of J. A.'s land was destroyed by an extraordinary storm and high tide. The wall was previously in good repair, and in a proper condition to resist the ordinary action of the sea:—*Held,* on the authority of *Keighley's Case* (10 Rep. 139) and *R.* v. *Commissioners of Sewers for Somerset* (8 T. R. 312), that, in the absence of evidence sufficient to shew that the prescriptive liability of the frontagers extended to the repair of damage occasioned by extraordinary violence of the sea J. A. was not liable to repair the damage thus occasioned to the wall at his own expense, but the expense of so doing

SEA-WALL—*continued.*
must fall on the whole of the level.—By s. 33 of the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), it is provided that commissioners of sewers acting within their jurisdiction may, without the presentment of a jury, make any order in respect of the execution of any work, the levying of any rate, or doing any act which they might but for this section have made with such presentment, subject to a proviso that any person aggrieved by any such order may appeal therefrom to the quarter sessions.—Orders were made by the Commissioners of Sewers upon J. A. to execute repairs to the sea wall rendered necessary by the aforesaid extraordinary storm and high tide. Among the commissioners making the orders were two persons who were interested in lands in the level, liable to be rated to a general rate:—*Held*, by the Queen's Bench Division, that these orders had, by virtue of the abovementioned section, the same effect as if made on the presentment of a jury, and that therefore so long as they stood they had the effect of adjudications against J. A. rendering him liable to do such repairs to the wall:—But *held*, also, by the Queen's Bench Division and the Court of Appeal, that such orders must be quashed on certiorari on the ground that two of the commissioners making them were interested parties. THE QUEEN *v.* COMMISSIONERS OF SEWERS FOR ESSEX **C. A. 561**

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SHIP — *Charterparty* — *"Excepted Dangers"* — *Option to cancel for non-arrival at Loading Port.*] By a charterparty of a steamship it was agreed that she should go to "three safe loading places" between two named ports and there load from the charterers a cargo of oranges and being so loaded proceed to London . . . . and deliver the same pursuant to bills of lading . . . . (the act of God . . . . and all dangers of the seas, rivers, and steam navigation of what nature and kind soever during the said voyage always excepted), and the charterers thereby promised to load the cargo, and stipulated, after a provision for working and lay days, that "should the steamer not be arrived at first loading port free of pratique and ready to load on or before the 15th of December next, charterers have the option of cancelling or confirming this charterparty."—By dangers of the seas, the steamer, although arrived at the first loading port, was not free of pratique and ready to load on the 15th of December, and the charterers therefore cancelled the charterparty. At the trial of an action against them for not loading the cargo, the judge left to the jury the disputed question whether the port was a "safe loading place," but being asked by them for his opinion thereon, gave it, and they found in the affirmative:—*Held*, (1) that this expression of opinion was under the circumstances no misdirection; (2) that the excepted dangers clause applied only to the voyage, and not to the clause giving the option to cancel the charterparty if the ship was not ready to load on the day fixed, and therefore the cancellation was justified. SMITH *v.* DART & SON - - - - - - 105

SHIP—*continued.*

2. —— *Demurrage—Charterparty—Lay Days—Usual Place of Discharge—Custom to lighten Vessel at Entrance to Port before proceeding to Place of Discharge.*] By charterparty it was agreed that the plaintiff's steamship should proceed to Cronstadt and load a cargo of wheat and therewith proceed to a port in the English or Bristol channel as ordered, "or so near thereto as she may safely get at all times of tide and always afloat, and deliver the same. Eight running days, Sundays excepted, to be allowed the merchants, if the ship be not sooner dispatched, for loading and discharging the steamer, and ten days on demurrage if required over and above the laying days at 25*l.* per day." The steamer arrived at Cronstadt, occupied six running days in loading a cargo of 4325 quarters of wheat, and was ordered to Gloucester, Bristol Channel, for discharge. She arrived at Sharpness Dock in the Bristol Channel on the 13th of November. Sharpness Dock is within the port of Gloucester, and about seventeen miles from the basin within the city of Gloucester where grain cargoes are usually discharged if the burthen of the ship will admit. The steamer was ready to commence the discharge of her cargo on the 13th, but could not get nearer to Gloucester than Sharpness until part of her cargo was first discharged at Sharpness. On the 14th and 15th of November the consignees discharged into lighters 1585 quarters of the cargo, and then required the master to take the steamer through the canal to a place of discharge within the basin at Gloucester. The master proceeded, and arrived in the basin on the 17th. On the 18th the residue of the cargo was discharged and the vessel returned to Sharpness, where she arrived on the 19th. In an action for demurrage evidence was given of a custom of the port of Gloucester, according to which the usual place of discharging grain cargoes was at the basin within the city, and when vessels with grain cargoes destined for Gloucester were of too heavy a burthen to come up the canal they were lightened at Sharpness, and during the discharge at Sharpness of so much of the cargo as it was necessary to discharge in order to enable the vessel to proceed by the canal to Gloucester Basin the lay

SHIP—*continued.*
days counted, but the time occupied by coming up the canal to discharge at Gloucester Basin and by returning to Sharpness was not counted:—*Held*, first, that the custom was reasonable, as the effect of it was not to detain the ship longer than if she had been wholly discharged at Sharpness; secondly, that it was not inconsistent with the express provision in the charterparty as to running days, for the proper inference from the facts was that the discharge of the vessel except for the purpose of lightening her did not commence until she arrived within Gloucester Basin. That, therefore the time occupied by the vessel in going from Sharpness to the basin and in returning to Sharpness ought to be excluded from the lay days, and the plaintiffs were entitled to one day's demurrage only.—*Caffarini* v. *Walker* (Ir. Rep. 9 C. L. 431; Ir. Rep. 10 C. L. 250) and *McIntosh* v. *Sinclair* (Ir. Rep. 11 C. L. 456) considered. NIELSEN *v.* WAIT - - - - 516

SOLICITOR—*Lien—Charging Order—Garnishee Summons—Priority—23 & 24 Vict. c. 127, s. 28.*] The proceeds of a fi. fa., issued on behalf of the successful plaintiff in an action, were attached in the hands of the sheriff by a garnishee summons from a county court to answer a judgment obtained against the plaintiff in that court. The plaintiff's solicitor in the action, who had received notice of the service of the garnishee summons, subsequently obtained an order under 23 & 24 Vict. c. 127, s. 28, charging the fund recovered with costs of the action remaining due to him:—*Held*, that such order was rightly made, and the solicitor's claim was entitled to priority over the claim of the judgment creditor of the plaintiff under the garnishee summons.—Decision of the Queen's Bench Division (13 Q. B. D. 543) affirmed. DALLOW *v.* GARROLD. EX PARTE ADAMS - - - - - C. A. 543

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